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Prospects for Satisfactory Dispute Resolution of Private Commercial Disputes under the North American Free Trade Agreement

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I. INTRODUCTION

"Laissez faire. Let business go forward. No interference."[1]

"World trade is poised at a critical juncture, when many societies are initiating democracy. Open and fair trading systems like NAFTA demonstrate to the world the way to future prosperity."[2]

"Essential to the smooth flow of international commerce is an efficient and flexible method for settling disputes."[3]

Assume you own a small manufacturing business in Southern California. Being reasonably well-read, you note with interest the passage of NAFTA, the North American Free Trade Agreement. You learn that the Agreement is intended to create greater opportunities for the American businessman. You talk to a business consultant who introduces you to a Mexican company named Piemix. Piemix is interested in your products, and you are interested in obtaining sales in this new market. However, you are uncertain about the laws of Mexico, and feel that should anything go wrong, you would prefer to resort to an impartial authority. Your business consultant advises you to include an arbitration clause in your sales contract so that any disputes arising under the deal would be handled in arbitration proceedings. Taking your consultant's advice, you

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1. HUGH RAWSON & MARGARET MINER, THE NEW INTERNATIONAL DICTIONARY OF QUOTATIONS 47 (1986) (quoting MARQUIS D' ARGENSON, MEMORIES, 1736, Vol. 5). Though difficult to substantiate, the phrase "laissez faire" arguably originated in 1751 when then minister of finance of France, Jean Baptist Colbert, asked businessmen how to promote business. *Id.* The businessmen replied, "Laissez-nous faire," roughly "Let's us get on with it." *Id.* This phrase has come to stand for an ideal for the free passage of goods. *Id.*

2. S. REP. NO. 266, 102d Cong., 2d Sess. 275 (1992).

3. H.R. REP. NO. 501, 101st Cong., 2d Sess. 4 (1990).

contract to provide 100 items to Piemix for $100,000, and you include an arbitration clause in the contract.

After delivering half of the items, Piemix informs you that it will not proceed with the deal and will not return the items delivered. Negotiations fail, and you proceed to arbitration to resolve the dispute. You win a final arbitral award and seek its enforcement in the United States. Piemix, however, is a state-owned business, as opposed to a private company. Piemix asserts its immunity from jurisdiction in the courts of the United States which precludes the enforcement of the arbitral award.[4]

This Comment addresses such hypothetical situations and the means by which parties can avoid such problems under NAFTA. This Comment first provides a general introduction to NAFTA, followed by a more specific discussion of the potential problem noted in the hypothetical. Section II will discuss the current expansion of international trade and its regulation through the use of trade agreements such as NAFTA.[5] Section III examines NAFTA in general and its impact on U.S.-Mexico relations in particular.[6] Section IV examines the use of international commercial arbitration as a means of obtaining certainty in international business transactions.[7] Section V discusses the provisions for private commercial dispute settlement under NAFTA.[8] Finally, section VI will provide recommendations and guidance for the private business person seeking to engage in trade with Mexico.[9]

On November 20, 1993, the North American Free Trade Agreement obtained final congressional approval, thus uniting the United States, Canada, and Mexico[10] into the "world's largest free-trade zone."[11]

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4. *See infra* notes 20-21 and accompanying text for some examples of how such problems can arise.

5. *See infra* notes 34-161 and accompany text.

6. *See infra* notes 162-219 and accompanying text.

7. *See infra* notes 220-302 and accompanying text.

8. *See infra* notes 303-466 and accompanying text.

9. *See infra* notes 467-535 and accompanying text.

10. This Comment will focus primarily on the impact that NAFTA will have on relations between the United States and Mexico. NAFTA incorporates most of the existing provisions of the UNITED STATES - CANADA FREE TRADE AGREEMENT. U.S. INT'L TRADE COMM'N, PUB. NO. 2596, POTENTIAL IMPACT ON THE U.S. ECONOMY AND SELECTED INDUSTRIES OF THE NORTH AMERICAN FREE-TRADE AGREEMENT (Jan. 1993), *available in* WESTLAW, FINT-ITC Database [hereinafter POTENTIAL IMPACT.] NAFTA is expected to have "minimal additional effects" on this relationship. *Id.*; *see infra* notes 153-61 and accompanying text for a discussion of the UNITED STATES - CANADA FREE TRADE AGREEMENT. "[T]he principal effects of NAFTA" will be to change the United States - Mexico relationship. POTENTIAL IMPACT, *supra*. Thus, this Comment will focus on the relationship that will be most apt to change from NAFTA. For a description of how a typical pre-NAFTA sales transaction might have proceeded for an American seller in Mexico, see Eduardo Siqueiros, *Legal Framework for the Sale of Goods Into Mexico*, 12 HOUS. J. INT'L L. 291, 304-14 (1990).

11. Helen Dewar, *NAFTA Wins Final Congressional Test*, WASH. POST, Nov. 21,

Though intensely debated,[12] NAFTA "really does a very simple thing;" it eliminates, over time, tariffs and nontariff barriers[13] among the aforementioned countries. NAFTA creates a market of 370 million people with $6.5 trillion in production.[14] This market combines abundant natural resources with technological advancement.[15] With the passage of NAFTA, the United States signaled that it is prepared to participate and compete in the global market.[16] Furthermore, NAFTA solidifies the gains in inter-

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1993, at A1. The Senate approved this "historic trade agreement" by a vote of 61 to 38. *Id.* The House of Representatives had previously approved the agreement on November 17, 1993 by a 234 to 200 vote. Kenneth J. Cooper, *House Approves U.S. - Canada - Mexico Trade Pact on 234 to 200 Vote, Giving Clinton Big Victory*, WASH. POST, Nov. 18, 1993, at A1. NAFTA became effective on January 1, 1994. *Id.* "This Agreement shall enter into force on January 1, 1994, on an exchange of written notifications certifying the completion of necessary legal procedures." North American Free Trade Agreement, Jan. 1, 1994, U.S.-Can.-Mex., ch. 22, art. 2203, 107 Stat. 2123 [hereinafter "NAFTA"].

12. Although this Comment will not specifically address the contentions of those opposed to NAFTA, it should be noted that NAFTA is not set in stone. All that is required to withdraw from NAFTA is notice and six months. "A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other parties." NAFTA, *supra* note 11, art. 2205.

13. NAFTA embodies "free trade, not economic union." Harry Stainer, *Sovereignty is Safe, Trade Official Says*, PLAIN DEALER, Dec. 13, 1992, at 4B (quoting William H. Cavitt, Director of Canada Office in U.S. Department of Commerce). The participating countries merely agree to free trade. There is no concomitant reduction of sovereignty by adoption of an economic union as illustrated by the European Community. *Id.*; *see infra* note 133 and accompanying text for a discussion of the European Community.

14. *Editorial, For the Record*, WASH. POST, Sept. 24, 1993, at A22 [hereinafter *Editorial*]. NAFTA, a "key to new job creation and economic growth," allows the United States to compete in a global market. *Id.* See *infra* notes 34-60 and accompanying text for a discussion of the global marketplace. NAFTA also allows an increased competitive edge against other regional trading areas, particularly Europe and Japan. *Editorial, supra.* See *infra* notes 129-61 and accompanying text for a discussion of regional trading blocs. NAFTA also provides a stepping stone into the vast market of Central and South America, which contains 400 million people. *Editorial, supra.* See *infra* notes 203-19 and accompanying text for a discussion of entry into Latin American markets.

15. Mario L. Baeza, *Benefits to the United States Business and Financial Communities From a North American Free Trade Agreement*, 643 PLI/COMM 259 (1992). *See also* DOING BUSINESS IN MEXICO 1 (Edward L. Newberger ed. 1974).

16. Alan Murray, *The Outlook: NAFTA Win is Crucial To Asia Talks Success*, WALL ST. J., Nov. 15, 1993, at A1. Passage of NAFTA was particularly important as it was a "highly visible sign" of the path that the United States would follow in the post Cold-War world. *Id.*

national trade already realized by the participating countries.[17] Accordingly, NAFTA will create enumerable benefits for all of its parties.[18]

NAFTA attempts to benefit American business by increasing business opportunities through increased international trade. The agreement will arguably have the greatest benefit to "small and medium-sized companies that are experiencing the fastest export growth."[19] Some commentators, however, warn against assuming that NAFTA will be a panacea for smaller-sized businesses.[20] In an atmosphere where trade problems are likely,

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17. NAFTA acts by "locking in the progress thus far achieved in . . . economic relations, preventing sudden changes in national trade and investment policies." Juan R. Espana, *Impact of the North American Free Trade Agreement (NAFTA) on U.S.-Mexican Trade and Investment Flows*, 28 BUSINESS ECONOMICS 41, July 1993. NAFTA accomplishes this by adding an "element of predictability" to economic relations between the countries. *Id.; see also* Carla A. Hills, Address Before the Senate Finance Committee (Sept. 8, 1992), *in The North American Free Trade Agreement: A Promise Fulfilled*, 3 U.S. DEP'T OF STATE DISPATCH 697, Sept. 12, 1993 (stating that the United States is competing successfully with Mexico already).

18. NAFTA is expected to "eliminate irrational and wasteful trade barriers, boost economic growth, reduce consumer prices, raise living standards, foster political stability and reform in Mexico and diminish illegal immigration into the United States." Stephen Chapman, *A Green Bogeyman Causes Unfounded Fear of NAFTA*, CHI. TRIB., July 4, 1993, at 3C. Various studies of NAFTA indicate a "surprising degree of unanimity" in the belief that NAFTA will create jobs and wage gains in the United States. Overview, The North American Free Trade Agreement, Aug. 1992, 1992 WL 239304 (N.A.F.T.A.) [hereinafter Overview: NAFTA]. *See, e.g.*, CLINTON R. SHIELLS & ROBERT C. SHIELBURNE, U.S. INT'L TRADE COMM'N, PUB. NO. 2508, ECONOMY-WIDE MODELING OF THE ECONOMIC IMPLICATIONS OF A FTA WITH MEXICO AND A NAFTA WITH CANADA AND MEXICO (May 1992), *available in* WESTLAW, FINT-ITC database.

19. Hills, *supra* note 17. By removing trade barriers, smaller firms can sell their products and/or services in Mexico without having to build facilities in Mexico, a cost many such businesses could not undertake. Report of the Administration on the NAFTA and Actions Taken in Fulfillment of the May 1, 1991 Committees, Sept. 18, 1992, 1992 WL 360154 (N.A.F.T.A.) [hereinafter Report of the Administration on NAFTA].

20. "NAFTA is being sold as the gold rush of the '90s . . . [yet] anyone smaller than Chevron or GM is going to have to fight a 10-year legal battle" should any disputes arise while engaging in trade with Mexico. Jack Andersen & Michael Binstein, *Doing Business in Mexico: The Big Payoff 'The Court of Last Resort Can Often Be A Corrupt Cop of a Graft-Seeking Judge,'* WASH. POST, Sept. 20, 1992, at C7. This article indicates smaller businesses must consider the substantial risks of doing business with Mexico, even in light of NAFTA. *Id.* The authors focus on a dispute an American businessman, Jack Andrews, had with Andsa, the Mexican government's food storage monopoly. *Id.* After eight years and two default judgements for $2 million, Andrews has yet to collect any money. *Id.* The authors note "the lack of an effective arbitration mechanism for disputes between American companies and the government-sponsored monopolies in Mexico." *Id.*

Even with passage of NAFTA, most attorneys believe "settlement of business disputes between private firms will remain a problem." Dianne Solis, *In Mexico, A Dispute Over a Business Deal May Land You In Jail*, WALL ST. J., Sept. 27, 1993, at

the risks of doing business in Mexico under NAFTA remain sizable for small and medium-sized businesses.[21] A successful NAFTA requires effective dispute resolution procedures to handle such eventualities.[22] The call for increased international trade cannot be sustained without enforcement of the agreements which fuel the heightened trade.[23] The lack of adequate dispute settlement procedures can result in "serious problems with the implementation of the obligations in NAFTA."[24]

A1. Ms. Solis indicates how disputes have arisen due to the statutory protection provided by the Foreign Sovereign Immunities Act (FSIA). *Id.* She notes how U.S. businessman Robert Gough initiated suit in a federal court in Houston against Petroleos Mexicanos (PEMEX), the national oil company of Mexico, to obtain payment on four valves that had been provided by his company, Tubular U.S.A. Inc. *Id.* Although the court held that PEMEX was culpable, it found the company shielded from a suit by the FSIA. *Id.* "In short, Pemex could act like a business, but when it pleased, it could claim a sort of governmental status." *Id.* See *infra* notes 398-99 and accompanying text for discussion of the FSIA.

21. For example, consider the situation of Texas businessman Bill Flanigan. Tod Robberson, *Mexico's New Image Still Needs Focusing, Say Foreign Businessmen*, WASH. POST, Nov. 6, 1992, at A21. Flanigan brought suit against PEMEX for violation of the United States RICO act. *Id.* Flanigan obtained two successive judgements, but has not been able to collect. *Id.* He pursued a $1 billion case against PEMEX in the United States Supreme Court but was denied certiorari. *Id.* In eight years of pursuit for a legal remedy, Flanigan has collected only about $1 million dollars. Solis, *supra* note 20. See *infra* notes 426-42 and accompanying text for discussion of the Flanigan case. *See also Doing Business With Mexico*, WASH. POST, Oct. 20, 1992, at A18 (further examining problems encountered by American businessmen doing business in Mexico); Tod Robberson, *Mexico's Banking Afflicts Investors; Corruption Said To Be Compounding Risk*, WASH. POST, Apr. 30, 1993, at A35 (discussing abuses in Mexican banking system affecting American businessmen).

22. Other agreements similar to NAFTA, such as the Canada - United States Free Trade Agreement "could not exist without agreed dispute-resolution procedures." Seymour J. Rubin, *The Interest Group on Avoidance and Resolution of International Economic Disputes*, 83 AM. SOC'Y INT'L L. PROC. 152 (1989). See *infra* notes 153-61 and accompanying text for discussion of Canada - United States Free Trade Agreement. NAFTA acknowledges this concern in Chapter One under Article 102: "The objectives of this Agreement . . . are to . . . create effective procedures for the implementation and application of this Agreement, for its joint administration and *for the resolution of disputes* . . . ." NAFTA, *supra* note 11, art. 102 (emphasis added).

23. President Clinton has stated: "We cannot ask businesses and their workers to take the risks of doing business in the global marketplace unless we can guarantee that agreements will be enforced." Michael Kantor, *Trade Central to America's Future in the World*, Address, *in* US DEP'T ST. DISPATCH, May 17, 1993, at 352(3).

24. *North American Free Trade: Barriers in Free Trade Arising From Differences in National Law*, 86 AM. SOC'Y INT'L L. PROC. 141 (1992) (Ursula Maria Odiaga, reporter) [hereinafter Barriers in Free Trade].

NAFTA contains three major dispute resolution mechanisms.[25] This Comment focuses solely on those provisions related to disputes arising among the participating parties, and in particular disputes among private commercial parties. Chapter 20 of NAFTA, entitled "Institutional Arrangements and Dispute Settlement Procedures," contains such provisions.[26] Articles 2003 to 2019 in Section B of this chapter provide the mechanism for the resolution of disputes arising among the member countries.[27] Private commercial disputes may also be resolved through these provisions, provided that the dispute involves a large, multinational company, with enough economic clout to apply pressure on the particular governmental entity involved in the dispute.[28] Yet, under NAFTA, smaller businessmen without the requisite clout seem "left out in the cold,"[29] as NAFTA does relatively little to empower small and medium-sized businesses to effectively resolve their own commercial trade disputes.[30]

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25. Gary N. Horlick & F. Amanda DeBusk, *Dispute Resolution Under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID*, 27 J. WORLD TRADE 21. In Chapter 11, NAFTA presents the relevant mechanisms for resolving investor disputes. Chapter 19 deals with disputes arising due to antidumping and countervailing duty matters. In Chapter 20, NAFTA provides the mechanism for resolving party disputes. *Id.* For a concise outline of the relevant provisions of each chapter, see Kenneth P. Freiberg et al., *Dispute Settlement Under the North American Free Trade Agreement*, *in* MEXICO—INVESTMENT AND TRADE: PROGRESS AND PROSPECTS (PLI Commercial Law & Practice Handbook Series 1993).

26. NAFTA, *supra* note 11, ch. 20. Chapter 20 was modeled after Chapter 18 of the Canada-United States Free Trade Agreement. Horlick & Debusk, *supra* note 25, at 34. NAFTA's Chapter 20 provisions can be utilized instead of GATT dispute resolution provisions. *Id.* See *infra* notes 97-112 and accompanying text for a discussion of GATT.

27. NAFTA, *supra*, note 11, arts. 2003-19. Very generally the provisions provide for the following:

> The countries would try to solve any complaint through negotiations. If that didn't work, a panel of experts from the three countries would evaluate the complaint. The government would have 60 days to enforce its laws if the complaint was found to be valid. If that didn't happen, the panel would have 60 days to come up with its own enforcement plan and levy a fine of as much as $20 million.

Asra Q. Nomani & Dianne Solis, *NAFTA Is Facing Difficult Trial In the Congress*, WALL ST. J., Aug. 16, 1993, at A3. Chapter 20 only operates upon request by "the three national governments." Horlick & Debusk, *supra* note 25, at 35. Chapter 2 of NAFTA contains the general definitions for words and phrases utilized in the text, and though "Party" is not defined therein, it is clear from a reading of NAFTA that "Party" refers to the national governments of Canada, the United States of America, and Mexico.

28. Andersen & Binstein, *supra* note 20.

29. *Id.* "NAFTA doesn't deal with private-party-to-private-party disputes" stated Julius Katz, NAFTA's chief negotiator under the Bush administration. Solis, *supra* note 20.

30. Wayne I. Fagan & Carlos Gabuardi Arreola, *The Arbitration of Private Commercial Disputes Between Residents of Texas and Mexico*, 24 ST. MARY'S L.J. 803,

Only a single article, Article 2022 advocates the use of arbitration and other methods of dispute resolution in international trade disputes.[31] Among private parties NAFTA does not add anything substantive to the field of private commercial dispute settlement, relying instead on commercial dispute conventions already in existence.[32] The relevant NAFTA provisions designed to resolve private commercial disputes do not appear to fully advance the objectives of United States trade policy with respect to smaller businesses engaging in international trade.[33]

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817 (1993).

31. Article 2022, in Chapter 20 of NAFTA provides in part:

> 1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
> 2. To this end, each Party shall provide appropriate procedures to ensure the observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.
> 3. A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.

NAFTA, *supra* note 11, art. 2022.

32. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1975 Inter-American Convention on International Commercial Arbitration. NAFTA, *supra* note 11, art. 2022, § 3. See *infra* notes 270-302 and accompanying text for a discussion of above two Conventions.

33. Title 15 of the United States Code Annotated, Commerce and Trade, provides:

> It is the declared policy of the Congress that the Federal Government . . . should aid and assist small businesses . . . to increase their ability to compete in international markets by . . . ensuring that the interests of small businesses are adequately represented in bilateral and multilateral trade negotiations.

15 U.S.C. § 631(b)(1) (1988).

Thus, Congress has formally recognized the need to provide for smaller businesses in trade treaties, such as NAFTA. Part of adequately providing for small business entails adopting effective dispute settlement procedures for international trade. Title 19 of the United States Code Annotated provides in part: "The principal [trade] negotiating objectives of the United States with respect to dispute settlement are . . . to provide for more effective and expeditious dispute settlement mechanisms and procedures . . . ." 19 U.S.C. § 2901(b) (1988). NAFTA negotiators stated the individual businessman was consulted as NAFTA involved "the most extensive . . . private sector consultations ever undertaken in connection with trade negotiation." Report of the Administration on NAFTA, *supra* note 19.

Yet, NAFTA, at over 1000 pages in length, has only one article dealing with private commercial disputes. A simple comparison of volume of text would indicate that

II. INTERNATIONAL TRADE AND TRADE AGREEMENTS

A. *International Trade and the U.S Perspective in General*

International trade has been the centerpiece for the development of many nations and cultures in the past.[34] Though well-documented, the numerous advantages of international trade are outside the scope of this Comment. This Comment relies on a single fundamental premise of international free trade, that of comparative advantage. When nations are allowed to specialize in the production of goods and then exchange such goods, there occurs a maximizing of the "welfare of nations participating in that trade."[35] This premise remains valid despite newly advanced theories of economics.[36] However, in today's increasingly complex world, some argue that a more subtle doctrine has replaced this "theology of free trade" as "holy economic writ."[37] This modern doctrine rejects free

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the United States, in negotiating NAFTA, did not fully consider the interests of smaller businesses.

34. GILBERT R. WINHAM, THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS 5-10 (1992). Trade enhanced state development by increasing "state revenue and state power." *Id.* at 6. Athens, Egypt, the Italian city states of Venice, Florence, and Genoa all greatly increased their power through international trade. *Id.* at 6-7.

35. *Id.* at 9. *See also* Sharon D. Fitch, *Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences Between The United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures*, 22 CAL. W. INT'L L.J. 353, 355-56 (1992). Comparative advantage embodies the principle that "if every country concentrates on the production of goods and services that it can produce relatively more efficiently than other countries, national and world living standards will be maximized." JOHN CRISPO, FREE TRADE: THE REAL STORY 2 (1988). The importance of this concept to world trade remains "unassailable." *Id.* In fact, the Greek philosopher Plato understood this concept long ago when he stated:

> [M]ore things will be produced and the work be more easily and better done, when every man is set free from all other occupations to do, at the right time, the one thing for which he is naturally fitted.

PLATO, THE REPUBLIC 57 (Francis M. Conford trans. 1941). One commentator argued that the concept of comparative advantage applies directly to NAFTA: "Failure to implement NAFTA would mean giving up a unique opportunity to move both economies to a higher level of efficiency and welfare." Espana, *supra* note 17.

36. WINHAM, *supra* note 34, at 9. However, others argue that such ideas are "historically interesting," yet totally irrelevant in addressing modern trade under "conditions totally different" from those existing when such theories were first developed. Edmund G. Brown, Jr., *Free Trade Fetish Things Have Changed Since David Ricardo's Time*, WASH. POST, Sept. 14, 1992, at A15. These opponents to free trade believe the mobility of capital and the presence of "global" corporations have dramatically changed the international trade landscape, thus making such theories inapplicable at present. *Id.* These critics would not examine the positive implications of NAFTA on a large scale, that is as to the aggregate benefits to the relevant countries involved, but rather would focus on individuals, those "people in their daily lives in all three countries." *Id.*

37. R.C. Longworth, *U.S. Doing About Face on Trade*, CHI. TRIB., Mar. 21, 1993,

trade as an unattainable objective, preferring to embrace the concept that United States trade policy should further United States interests.[38] The ideal of supporting pure free trade would defer to an active, managed trade policy, thus allowing the United States to compete successfully with Europe and Japan.[39]

However, under either a pure free trade or managed trade perspective, increasing world trade means the creation of wealth for participant countries.[40] The striving for creation of national wealth via international trade seems to have supplanted most other contemporary governmental concerns.[41] For the United States, further growth in international trade has enormous repercussions because the ability of the United States to grow economically has become "closely tied" to our ability to compete in the world market.[42] To remain a dominant player on the world scene the United States must take a prominent role in promoting world trade.[43]

(Business) at 1.

38. *Id.*

39. In fact, a large degree of NAFTA's appeal lies in the argument that it allows the "United States to be competitive with Europe and Japan." *Senators Press USTR Kantor On Canadian Wheat; Urge Action*, BNA INT'L TRADE DAILY, Sept. 16, 1993, *available in* WESTLAW, BNA-BTD Database. In an interesting twist, the concept of "managed trade" that Latin American countries have recently abandoned has begun to "emerge as part of official U.S. economic doctrine, itself a reaction to similar policies practiced by the Japanese and Europeans." Moises Naim, *Latin America: Post-Adjustment Blues*, FOREIGN POLICY 133 (Fall 1993). See *infra* notes 203-19 and accompanying text for discussion of Latin America trade. This move towards managed trade has been steady for the past two decades. WINHAM, *supra* note 34, at 109.

40. Longworth, *supra* note 37, at 9.

41. "The principal challenge now facing the United States is to compete in a rapidly changing and expanding global marketplace." *North American Free Trade Agreement*, 3 U.S. DEP'T ST. DISPATCH, Aug. 17, 1992, at 641(4). With the Cold War over, the United States must now focus on economic concerns to retain a position of power in the new world order. *Id.*; *see also* Jonathan Peterson, *The New Cash Diplomacy: The Next President's Foreign Policy Will Be Based on Economics, Not Idealogy*, L.A. TIMES, Nov. 3, 1992, (World Report) at 5 (noting that economic concerns will likely compete with military concerns in forming United States foreign policy). *Contra* WINHAM, *supra* note 34, at 3 (noting "crisis and war" remain dominant concerns in the international arena, while economics and trade remain recessive).

42. *White House Fact Sheet on NAFTA*, BUS. AM., Aug. 24, 1992, at 22. In 1991, exports accounted for 7.5 million United States jobs, and of these, 2.1 million were supported by exports to Canada and Mexico, the other trading partners in NAFTA. *Id.*

43. Thomas E. Stewart, *The New Face of American Power*, FORTUNE, July 26, 1993, at 70. The demise of the Soviet Union and the attendant military threat means American military might have less use and meaning. *Id.*

Such a position of leadership must become the new goal of United States foreign policy.[44] President Clinton has adopted this view, stating that "[f]or now and for the foreseeable future the world looks to us to be the engine of global growth and to be the leaders."[45] The President has warned about the potential adverse consequences of looking inward, while other countries move forward in exploiting the benefits of a newly emerging world economy.[46]

With the diminished threat of the Soviet Union, the end of the Cold War, and less focus on military concerns, it is an ideal time for the United States to focus on promoting international trade and a new world or der based on mutually advantageous trade. Yet, interest in promoting such a system has "wan[ed] in country after country, including the United States."[47] Rather than demonstrating an active interest in promoting free trade, the United States has moved toward the "strongest protectionist sentiment in years."[48]

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44. Thomas Stewart argues that foreign policy should strive for "integration" such that:

> It can be America's mission to lead the process of forging links among nations that are stronger than the forces that estrange them; to help commerce and capital flow freely; to offer all nations reasonable confidence that gains from free riding or rogue behavior will not stand; and to pursue these goals wherever and whenever the chance arises.

Id.

However, it is questionable whether the United States can unilaterally compel such free trade since it is unlikely that the United States can "control the outcome" of such decisions. Peterson, *supra* note 41, at 5. Though perhaps the "biggest" player in the global marketplace, the United States is now one of many and cannot dictate its will as it perhaps did in the past. *Id.*

45. *Trade Central to America's Future in the World*, 4 U.S. DEP'T ST. DISPATCH, May 17, 1993, at 352(3). President Clinton appears committed to adapting to a global economy and realizes that international trade has become a necessity in the new world order:

> Today our challenges are dynamic, not static. Economic strength, founded on human resources and nourished by trade, is a pillar of national security in this new Post-Cold War age. Our security interests—and those of others—are inextricably linked to the growth and fairness of the global trading system.

Id.

46. *President Urges Grass Roots Support For NAFTA, Encourages Write-In Campaign*, BNA INT'L TRADE DAILY, Sept. 16, 1993. By not taking advantage of international trade, United States economic growth and job creation will decline. *Id.*

47. The forces that once bound countries together have lessened. Jim Hoagland, *The Turn Toward Isolation*, WASH. POST, Sept. 22, 1993, at A23. Sharing a common concern of military threat and benefiting from an ever-expanding "global pie of trade and investment," nations naturally cooperated. *Id.* However, with a diminished military threat, the pie has stopped increasing, and the new "game" involves trade rivalries among the industrial powers. *Id.*

48. *U.S. Trade Negotiations*, L.A. TIMES, Feb. 19, 1993, at B6. Some point out that

The contradictions inherent in world trade have fueled these protectionist views.[49] Promoting free world trade has already increased the wealth of some nations; now, these nations have become "decreasingly tolerant" of change, whenever change means increased competition from nations which have yet to benefit.[50] The nations that have already benefitted from world trade want to maintain the status quo and the wealth they now enjoy.[51] Many nations, the United States included, now attach an "array of economic and social uncertainties" on global trade.[52] The United States' has attempted to maintain an advantage in trade with Mexico; a general Mexican perception holds that "there has been a past pattern of the United States increasing trade barriers whenever Mexico becomes competitive in a particular industry."[53]

Yet, the ideal of free trade remains a fundamental principle of United States policy. This principle is codified in a variety of statutes.[54] The

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the vigorous effort needed to pass NAFTA indicates that the "whole notion of reducing trade barriers is in serious trouble." Henry F. Myers, *Free-Trade Idea Needs A Dominant Champion*, WALL ST. J., Nov. 22, 1993, at A1.

49. George F. Will, *NAFTA and the Great Wall of Fear*, WASH. POST, Sept. 26, 1993, at C7.

50. *Id.* The forces leading to this view are numerous: slowing growth of the world's major economies, increasing competition from developing countries, excess capacity in most industries on a global scale, and the resulting political frictions caused by weak job markets. Myers, *supra* note 48, at A1.

51. Stewart, *supra* note 43, at 70. Four of the richest nations in the world—France, Germany, Britain, and Japan—have all vehemently protested increased competition. *Id.* This merely reflects the "long history of mixed messages" received by the developing countries. Tim Carrington, *Developed Nations Want Poor Countries To Succeed on Trade, But Not Too Much*, WALL ST. J., Sept. 20, 1993, at A10. The industrialized countries first call for liberalized economies for the third world: privatize industries, limit state subsidies, and remove barriers to imports. *Id.* However, should these reforms create too strong an economy, the industrialized world responds with barriers to the developing countries exports. *Id.* "[T]he industrialized nations want their poorer counterparts to succeed, but not too much." *Id.*

52. Bob Davis & Jackie Calmes, *NAFTA's Odds Improve, But U.S. May Reduce Its Trade Leadership*, WALL ST. J., Nov. 17, 1993, at A1.

53. U.S. INT'L TRADE COMM'N, PUB. NO. 2275, REVIEW OF TRADE AND INVESTMENT LIBERALIZATION MEASURES BY MEXICO AND PROSPECTS FOR FUTURE UNITED STATES—MEXICAN RELATIONS (Apr. 1990) *available in* WESTLAW, FINT-ITC Database [hereinafter TRADE AND INVESTMENT LIBERALIZATION MEASURES].

54. Various United States Code sections embrace free trade. Section 2901 of Title 19, outlining trade objectives for the United States provides in part:

> The overall trade negotiating objectives of the United States are to obtain—
> (1) more open, equitable, and reciprocal market access;
> (2) the reduction or elimination of barriers and other trade-distorting policies

benefits of international trade remain manifest, and increasing international trade has become the rule rather than the exception.[55] The President must always remain committed to advancing international trade or be ready for the adverse impact of diminishing world trade.[56] The President must understand the complexity of the modern world in which the United States participates.[57] This belief is not exclusive to those in high positions, but arguably is well understood by the American people.[58]

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and practices; and

(3) a more effective system of international trading disciplines and procedures.

19 U.S.C. § 2901(a) (1988).

The ideal is presented even more forcefully in Section 631 of Title 15, dealing with commerce and trade, and providing in part:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgement be assured. The preservation and expansion of such competition is basic not only to the economic well-being *but to the security of this Nation.*

15 U.S.C. § 631(a) (1988) (emphasis added).

55. This notion has even reached the United States judicial system, as the Supreme Court has acknowledged the prevalence of international trade. Chief Justice Burger, in addressing the applicability of a forum selection clause in an international trade contract, noted a two decade long "expansion of overseas commercial activities." M/S Breman v. Zapata Off-Shore Co., 407 U.S. 1, 8 (1972). This observation would coincide with the trade liberalization that has occurred since the passage of the General Agreement on Tariffs and Trade (GATT) in 1947. See *infra* notes 97-112 and accompanying text for a discussion of GATT. Noting that American business seeks opportunities "in all parts of the world" and thus operates globally, the Court had to face "commercial realities and expanding international trade" to properly resolve the issue at hand. *M/S Bremen*, 407 U.S. at 11-12, 15. The net effect of the movement towards global trading is that "[a]ll countries are now recognizing that industrial competitiveness can only be achieved through access to international markets, with the result that governments - as well their industries - have now entered the race for external markets." WINHAM, *supra* note 34, at 114.

56. Some have noted that when pressure is exerted against international trade, the normally present sense of cooperation vanishes, resulting in adverse consequences. Hoagland, *supra* note 47, at A23. See *infra* notes 90-92 and accompanying text for discussion of the most dramatic period of adverse consequences under the Smoot-Hawley Tariff Act. In fact, history has shown that sometimes it takes "trade wars" to reestablish the benefits of cooperation in the first place. *Hoagland*, *supra* note 47, at A23. *But see* Myers, *supra* note 48, at A1 (warning that no one is so dominant as to impose free trade). *See also* Davis & Calmes, *supra* note 52, at A1. The movement of trade liberalization "has been slowed sharply and may be headed for reversal." *Id.*

57. *See generally* Richard C. Breeden, *The Globalization of Law and Business in the 1990's*, 28 WAKE FOREST L. REV. 509 (1993).

58. It has been expressed that "the American people understand that they are living in the modern world and that a globalized trading system is both beneficial and inevitable." *Review and Outlook: Halloween for NAFTA*, WALL ST. J., Sept. 9,

Some argue that open international trade is in fact a kind of hallmark of the American character.[59] The passage of NAFTA signaled that the United States was willing to participate in the global marketplace, and act according to its own ideals of free trade and open competition.[60]

B. Trade Agreements

In examining the implications of NAFTA, it is first necessary to determine the role that international trade agreements play in world trade generally.[61] Trade agreements have naturally developed as trade among differing groups increased.[62] These agreements arose as nations attempted to bring certainty into international transactions and to promote their

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1993, at A20.

59. The 1992 Joint Economic Report stated:

> A proclivity for leadership in the American character results in a natural reluctance to engage in protectionism, even as political opportunists sell it as a cure-all for increasingly stiff international competition. The openness of American society means that actual attempts to protect beleaguered American industries are often inept.

S. REP. NO. 266, 102d Cong., 2d Sess. 259 (1992).

60. Rejection of NAFTA would have signalled that the United States had turned "protectionist." Robert Keatley, *If NAFTA Fails, Negative Repercussions Could Reach Far Beyond North America*, WALL ST. J., Aug. 27, 1993, at A4. In fact, rejection would have severely limited the United States ability to conduct any "serious economic foreign policy." *Id. But see* James M. Sheehan, *NAFTA - Free Trade in Name Only*, WALL ST. J., Sept, 9, 1993, at A21. Sheehan proposes that NAFTA, with all its limitations and wording, is not truly an adoption of free trade. *Id.* "Free trade should be simple . . . . Hopelessly complex trade agreements that restrict free exchange are not repaired by the presence of free trade rhetoric. NAFTA's proponents are inspired more by what they hope it could be than by what it really is." *Id. Accord* Noam Chomsky, *'The Masters of Mankind': Notes on NAFTA*, NATION, Mar. 29, 1993, at 412. Chomsky argues that NAFTA has "only a limited relation to free trade." *Id.* He argues that NAFTA is drafted in such a way as to "keep the wealth and power firmly in the hands" of the industrialized nation, in this case the United States. *Id.* He further argues that the industrialized nations claim to want free trade and to help the poor countries, but in fact employ protectionist measures that have caused the "gap" between the rich and poor countries to have doubled since 1960. *Id.* The use of this protectionist measures "reduce income in the South by about twice the amount of official aid to the region." *Id.* This trend is likely to continue as, in the past decade, the rich countries have actually increased protectionism. *Id.*

61. WINHAM, *supra* note 34, at 4.

62. *Id.* at 4-5. The origins of trade agreements parallels that of trade in general, and as such, "came very early, and is far older than any other contact among remote groups that can now be traced." *Id.* at 5 (citations omitted).

own interests.[63] Although trade agreements had modest beginnings as "simple undertakings" among groups as to how commercial transactions would proceed,[64] these agreements now represent the culmination of years of negotiating, are vastly more complex, and cover all conceivable scenarios of international trade.[65] Trade agreements, such as NAFTA and The General Agreement on Tariffs and Trade (GATT),[66] comprise some of the most advanced agreements between countries.[67] Most significantly, the proliferation of international trade agreements has established a "framework for the rules governing international trade and international finance."[68] These agreements embody the closest thing to "legislation" in the international context.[69]

1. Trade Agreements Under United States Law

Treaties[70] made by the United States are expressly deemed to be the "supreme Law of the Land" by Article VI of the Constitution.[71] Trade

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63. WINHAM, *supra* note 34, at 17. *See also* Fitch, *supra* note 35, at 353.

> Trade between different areas of the world has occurred throughout history to the mutual advantage of the participants. In an effort to encourage such trade, nations have entered into international agreements that established the ground rules and parameters under which the various aspects of trade between the individual nations were to be conducted.

Id.

64. WINHAM, *supra* note 34, at 15.

65. Upon release by the Office of the United States Trade Representative, the NAFTA text checked in at a weighty 1,100 pages with an accompanying 900 page tariff schedule. *NAFTA National Treatment, MFN Rules May Apply to Tax Measures in Only Limited Cases*, BNA INT'L FIN. DAILY, Sept. 21, 1992.

66. *See infra* notes 97-112 and accompanying text.

67. The NAFTA text has been variously described as "massive" and a "2,000-page tome." Sheehan, *supra* note 60.

68. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Part III, Introductory Note, at 144 (1987). In fact, the law of international agreements has had as much significance in the international law realm as the law of contracts has in the domestic context. *Id.* at 147. International agreements, such as NAFTA, form a "principal source of international law." *Id.* at 144. However, comparisons to contract law should remain limited, as the law of international agreements and contract law have fundamental differences. *Id.* at 147. Therefore, a concept familiar and applicable in domestic contract law may find little support in "international law where there is often *no effective means of third party dispute resolution.*" *Id.* (emphasis added).

69. DAVID J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 729 (4th ed. 1991).

70. Defined broadly, a treaty merely indicates "any agreement between nations." JACKSON H. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 5 (1926). Under this definition, NAFTA is a treaty.

71. Article VI, clause 2 of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the*

agreements, as international agreements of the United States, become the law of the United States and are supreme over state law.[72] By their very nature, trade agreements have significant impact on the United States and are a matter of international concern.[73] Participation in a trade agreement like NAFTA carries an internationally recognized commitment; such an agreement places considerable obligations on all participating countries.[74] As a result, treaties and international agreements have be-

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Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added).

Cf. United States v. Belmont, 301 U.S. 324, 331 (1937). In *Belmont*, Justice Sutherland stated:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies . . . . And while this rule in respect of treaties is established by the express language of clause 2, Art. VI of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states . . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.

Id. Thus, supremacy of United States treaties is given not only by Article VI, but by the exclusive authority the United States has in the international sphere.

72. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(1) (1987). International agreements remain subject to the Constitution and cannot be given effect in violation thereof; however, an international agreement carries a strong responsibility, and the United States will be held accountable under international law to honor the agreement even if the agreement is deemed unconstitutional under United States law. *Id.* at cmt. a.

73. Much of the opposition to NAFTA stemmed from an idea that passage of NAFTA, as an international agreement, would impose responsibilities and obligations that would run counter to domestic policy. For example, the House proposed Resolution 246 when concerns arose over the impact that future international trade agreements would have on "U.S. health, safety, labor, and environmental laws." H.R. REP. NO. 635 (II), 102d Cong., 2d Sess. 2 (992). This Resolution arose in reaction to an adverse decision by a GATT panel in mid-1991. *Id.* Mexico had brought an action against the United States, asserting the United States embargo on Mexican tuna was contrary to GATT. *Id.* The United States had imposed the embargo, claiming that Mexico was violating the United States Marine Mammal Protection Act, partly designed to protect dolphins. *Id.* The GATT panel ruled against the United States and found the United States in violation of GATT by holding that United States laws "to protect the life or health of humans, animals, or plants could not be applied 'extrajurisdictionally.'" *Id.*

74. A treaty is "a solemn compact between nations. It possesses the same essential

come the primary source for creating and enforcing obligations in the international trading field.[75]

2. United States Trade Regulation

The regulation of international trade has always been of fundamental significance to the United States. The nation has always recognized the importance of establishing a well balanced international trade policy.[76] The United States determined that a coordinated trading policy was required as a "response to . . . trading breakdowns and imbalances."[77] The federal government, specifically Congress, is vested with the power to coordinate such a policy.[78] The President also has significant powers to affect the development of United States trade policy.[79] The most significant of these powers is the President's power to enter into treaties.[80]

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qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject-matter." RALSTON, *supra* note 70, at 6. However, international agreements differ from contracts in that they "cannot be enforced like domestic contracts." CRISPO, *supra* note 35, at 93. The effectiveness of international agreements relies on nations honoring their international "obligations and commitments." *Id.* However, a treaty will generally be interpreted in such a way so as to give effect to the obligation contained therein. RALSTON, *supra* note 70, at 26.

75. EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES, AND THE EUROPEAN COMMUNITY 6 (2d ed. 1986). International trade agreements and their defined obligations are necessary for the orderly conduct of international trade. Reliance on international law alone is not sufficient as it leaves "considerable latitude" for each state to pursue different trading and economic objectives. *Id.*

76. 19 U.S.C. §§ 1801-1991 (1988) (establishing an international trade expansion program).

77. MCGOVERN, *supra* note 75, at 6. The United States government appreciates that tariff and nontariff barriers are an effective way to establish stability in the United States economy.

> [D]islocations in national and international trade have motivated the federal government to . . . revise tariff policies and applicable procedures . . . . Congressional enactments . . . set forth programs and practices that provide for greater or lesser access to domestic and foreign markets, as economic conditions warrant [as] a response to those trading breakdowns and imbalances.

Id.

78. The Constitution authorizes Congress "to regulate Commerce with foreign nations." U.S. CONST. art. I, § 8, cl. 3. Congress has also been given express authority to establish tariffs and duties on foreign goods. "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . . ." U.S. CONST. art. I, § 8, cl. 1.

79. The President enjoys three distinct types of power over foreign trade: "power to regulate trade directly; power to achieve regulation by means of international agreements; and power to influence trade by other means." MCGOVERN, *supra* note 75, at 66.

80. "He shall have Power, by and with the Advice and Consent of the Senate, to

a. History of United States trade and trade regulation

Trade and trade agreements generally only take place if beneficial to the member countries.[81] For the entire international trading system to be effective, nations must understand the long-term benefits of increasing trade, as opposed to merely focusing on short-term gains.[82] An examination of recent U.S trade and trade regulations will reveal the dramatic changes that can occur as perspectives on international trade evolve.

i. Before and after The General Agreement on Tariffs and Trade (GATT)[83]

"[P]rotectionism was the norm" in the early nineteenth century.[84] However, Britain had an "industrial head start" and thus actively pursued free trade to sell its products.[85] Many countries followed this example, and liberal trade agreements soon followed.[86] Yet, factors lead to a diminished interest in free trade,[87] which came to an end with the First World War.[88]

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make Treaties . . . ." U.S. CONST. Art. II, § 2, cl. 2. The President also enjoys an "implied power" to make international agreements by "executive agreement." MCGOVERN, *supra* note 75, at 68. The distinction between treaties and executive agreements are peculiar to United States constitutional law; yet both bind the United States on an international level. *Id.*

81. Myers, *supra* note 48, at A1. Myers notes "several common threads" which weave throughout the history of international trade and highlight its cyclical nature: (1) when a country is in a powerful position to pursue its own economic goals and free trade enhances its ability to do so, then free trade will flourish, but (2) "when the pressure of competition and of slow economic growth" weakens the country's power, protectionist sentiments will return. *Id.*

82. Arthur Dunkel, *Foreword* to EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES, AND THE EUROPEAN COMMUNITY v (2d ed. 1986) [hereinafter Dunkel, *Foreword*]. Mr. Dunkel argues that nations will not respect the rules contained in GATT unless "convinced that observance of the rules promotes national and individual interests." *Id.*

83. General Agreement on Tariffs and Trade, October 30, 1947, 55 U.N.T.S. 188 [hereinafter GATT].

84. Myers, *supra* note 48, at A1. At this time, many developed countries prohibited the importation of competing country goods. *Id.*

85. *Id.*

86. *Id.*

87. See *supra* note 81 and accompanying text describing cyclical nature of international trade.

88. Myers, *supra* note 48, at A1.

After World War I, tariffs were raised with "disastrous results."[89] In America, the protectionist sentiment reached its zenith with passage of the Smoot-Hawley Tariff of 1930.[90] This Act represented the final step in the "long movement of nations to close off their economies to foreign imports."[91] As a result of retaliatory moves by other countries, world trade fell by two-thirds by the mid 1930s.[92]

President Roosevelt began the movement to liberalize United States trade policy.[93] At this time, similar to Britain in the early nineteenth century, the United States was in a unique position to benefit from free world trade.[94] After having greatly expanded its economic base during World War II, it was the only nation able to "jumpstart" the world's economies as they sought to recover from the ravages of the war.[95] The period immediately following World War II resulted in the creation of a "new regime" in trading.[96]

GATT embodies the major move toward establishing a new international structure on trade.[97] The United States, as a major proponent of GATT, can claim to be the "prime sponsor" of the free trade movement occurring after World War II.[98] GATT arose to counter the protectionist economic policies of the 1930s and 1940s.[99] The structure established under GATT has constituted the "central elements" of international trade

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89. 4 U.S. DEP'T ST. DISPATCH, May 17, 1993, at 354.

90. The well-known Smoot-Hawley Tariff Act was technically the Tariff Act of 1930 and is contained in Chapter 4 of Title 19 of the United States Code. The breadth of this act was substantial, imposing tariffs on "[a]ll articles imported into the customs territory of the United States from outside thereof." Revised Tariff Schedules, 19 U.S.C.A. § 1202(1) (West 1978).

91. WINHAM, *supra* note 34, at 19.

92. *Id.*

93. Myers, *supra* note 48, at A1.

94. *See supra* note 85 and accompanying text.

95. Myers, *supra* note 48, at A1.

96. WINHAM, *supra* note 34, at 20.

97. *See generally* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975); KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970).

98. *Review & Outlook: NAFTA Jitters in Europe*, WALL ST. J., Nov. 15, 1993, at A12. This article suggests that if NAFTA had been defeated, a strong message would have been sent that the United States was altering its course of free trade. *Id.* Such a new position would have had a "global" effect and would have seriously impeded the role of GATT in the future. *Id.*

99. GATT was "[e]stablished to deal with high tariffs and discriminatory quotas, the protectionist tools of choice in the 1930s and 1940s, [and] it was very successful." Barriers in Free Trade, *supra* note 24, at 143. GATT's preamble notes a primary objective of "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT, *supra* note 83, at 189.

for the past 40 years.[100] Referred to as the "paramount" treaty regulating international trade in goods, GATT enjoys widespread support with over 100 nations participating.[101] GATT functions as the "main forum" for two things, the reduction of trade barriers and the settlement of international trade disputes.[102] However, the major thrust of GATT is to reduce domestic trade barriers to foreign imports, thus increasing international trade.[103]

In particular, the provisions of GATT include two basic concepts. The most significant is that of the Most-Favored-Nation treatment (MFN) which requires that GATT members accord all other GATT members equal treatment.[104] Of secondary significance is the "national treatment" doctrine which requires equal taxation and regulation of foreign and do mestic products.[105] Both provisions are intended to remove discriminatory practices in international trade.

ii. GATT, the United States, and Mexico

Both the United States and Mexico are members of GATT. The United States remains a significant participant in GATT and is engaged in "virtually all areas of GATT activity."[106] Mexico joined GATT in 1986 as part of its market reform efforts.[107] In becoming a signator to GATT, Mexico accepted a "permanent obligation" to reduce tariffs.[108]

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100. Kenneth W. Abbot, *The General Agreement on Tariffs and Trade (GATT)*, I.E.L I-A (1989).

101. Lise Sue Klaiman, *Applying GATT Dispute Settlement Procedures to A Trade In Services Agreement: Proceed With Caution*, 11 U. PA. J. INT'L BUS. L. 657, 658 (1990).

102. Dunkle, *Foreword*, *supra* note 82, at v.

103. *Id.*

104. "[A]ny advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded im mediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *supra* note 83, at Article I (1). "Article I remains the cornerstone of GATT." WINHAM, *supra* note 34, at 47.

105. GATT, *supra* note 83, at Article III.

106. MCGOVERN, *supra* note 75, at 84.

107. White House Fact Sheet, Aug. 24, 1992. Even before joining GATT, however, Mexico was accorded Most Favored Nation treatment by the United States. Understanding Concerning Trade and Investment Relations, Nov. 6, 1987, United States-Mexico, 27 I.L.M. 438 (1988). For discussion of Most Favored Nation treatment, *see supra* note 104 and accompanying text. See *infra* notes 193-202 and accompanying text for discussion of Mexico's market reforms.

108. Response of the Administration to Issues Raised in Connection with the Negoti-

GATT still remains a vital part of international trade representing a "consensus" of over 100 signatory nations.[109] Furthermore, GATT will remain the "likely basis of trade for the next decade."[110] Though other trade agreements, such as NAFTA, will provide other market trading regimes, the importance of GATT can not be understated and it is in the best interest of the United States to attempt to accomplish "as much as possible within its framework."[111] GATT's legacy will remain as the forerunner in reducing protectionism, and thus increasing world trade.[112]

3. United States Response to Increasing International Trade

With increasing opportunities in international trade, the United States made a concerted effort to become involved. As part of this effort, the Trade Act of 1974 was passed.[113] The plan contained a number of ambitious goals. First, it proposed to "foster economic growth and full employment in the United States,"[114] in part by reducing or eliminating barriers to trade.[115] The plan expressly addressed the need for "fairness and equity" in international trading, and acknowledged that the GATT system needed reform.[116] In addition, and of particular relevance to Mexico, the Trade Act of 1974 envisioned providing easier access to the United States market to products from lesser developed countries.[117]

These goals were deemed necessary because it was believed that barriers to international trade were resulting in lower economic growth in foreign countries, and thus lower sales of U.S. products into those markets.[118] As a result, the President was "urged" to utilize all "appropriate and feasible steps within his power" to attempt to reduce such barriers.[119] In general, the Trade Act of 1974 was a codification of a recogni-

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ation of a North American Free Trade Agreement, Free Trade Negotiation with Mexico, Economic Impact, May 1, 1991, 1991 WL 434197 (N.A.F.T.A.) [hereinafter Response of the Administration: Economic Impact].

109. S. REP. NO. 266, 102d Cong., 2d Sess. 260 (1992).

110. *Id.*

111. *Id.*

112. WINHAM, *supra* note 34, at 44.

113. 19 U.S.C. §§ 2101-2495 (1988 & Supp. 1992).

114. *Id.* § 2102(1).

115. *Id.* § 2102(2).

116. *Id.* 2102(3). A major problem of GATT lied in its dispute resolution provisions or, rather, the lack thereof. Though often referring to dispute resolution, GATT contains "no single, sharply defined dispute-settlement procedure." Klaiman, *supra* note 101, at 660-61, 661 n.20. In fact, in more recent years, the provisions providing for dispute settlement have only been successfully invoked on "minor issues" with the "tougher and more contentious issues" left unresolved. *Id.* at 664.

117. 19 U.S.C. § 2102(6) (1988).

118. *Id.* § 2112.

119. *Id.*

tion that the growth of international trade was vital to the well-being of the United States, and that this required market access and the elimination of trade barriers.[120] The Trade Act of 1974 advanced the notion of increasing trade by establishing regional trading.[121]

Shortly thereafter, another enactment was passed, the Trade Agreements Act of 1979.[122] Besides restating the goals of the 1974 Trade Act of expanding world trade and increasing U.S. opportunities in such trade, it was noted that "rules" were now becoming necessary.[123] Part of America's new goal was to "improve the rules of international trade and to provide for the enforcement of such rules."[124] While not addressing whether there are any "rules" in international trade apart from those existing under treaties,[125] the United States recognized that the benefits of international trade were contingent upon stability in international trade.

In 1988, Congress revisited the issue of international trade with the Omnibus Trade and Competitiveness Act of 1988.[126] Again, the general overall U.S. trading objectives of market access and reduction of barriers were reiterated, and the Act echoed the call for a "more effective system of international trading disciplines and procedures."[127] However, the United States also introduced an improved system of dispute settlement as a principal trading objective.[128]

In this abbreviated look at recent Congressional enactments relating to international trade, the increasing sophistication and knowledge of the U.S. government becomes apparent. The initial goal was merely to increase international trade by removing barriers. Then, it was noted that

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120. *Id.* § 2113.

121. Section 2486 of the Trade Act of 1974 provided in part: "The President shall study the desirability of entering into trade agreements with countries in the northern portion of the western hemisphere to promote the economic growth of the United States and such countries and the mutual expansion of market opportunities." *Id.* § 2486(b). See *infra* notes 129-52 and accompanying text for a discussion of regional trading areas.

122. 19 U.S.C. §§ 2501-82 (1988 & Supp. 1992).

123. *Id.* § 2502.

124. *Id.* § 2502(4).

125. *See, e.g.*, HARRIS, *supra* note 69, at 1-22.

126. 19 U.S.C. §§ 2901-06 (1988 & Supp. 1992).

127. *Id.* § 2901(a).

128. "The principal negotiating objectives of the United States with respect to dispute settlement are . . . to provide for more effective and expeditious dispute settlement mechanisms and procedures." *Id.* § 2901(b)(1).

"rules" needed to be established and that simply increasing international trade was not the final answer. This was further refined to the belief that the "rules" required the inclusion of effective dispute settlement procedures.

4. Movement Towards Free Trade Zones

Apart from GATT, there exists a move toward free trade zones. This is not a novel movement but originated in the 1960s.[129] The purpose of a free trade zone[130] is to eliminate tariffs and trade barriers among the member countries, and thus increase trade among the respective countries.[131] Utilizing regional trading blocs as a new approach to trade,[132] more than a half dozen such blocks have developed.[133] The trade agreements which exist in these blocks are all consistent with GATT.[134] Such

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129. WINHAM, *supra* note 34, at 118. In the 1960s, the developing countries negotiated a series of free trade agreements that subsequently failed. *Id.*; *see infra* note 219 and accompanying text.

130. GATT states: "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories." GATT, *supra* note 83, at Article XXIV, 8(b).

131. Linda C. Rief, *Conciliation As a Mechanism For the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 579, 595 (1990).

132. Longworth, *supra* note 37. The approach outlined by GATT is deemed "outdated." *Id.* Present problems are better handled under regional agreements. *Id.*

133. Stewart, *supra* note 43. Such zones range from the European Community to a zone encompassing only Australia and New Zealand. *Id.* The European Community provides the most well known example and warrants further discussion.

The European Community (EC) was established as a "customs union," to eliminate internal customs duties and establish external custom duties. U.S. INT'L TRADE COMM'N, PUB. NO. 2501, THE EFFECTS OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES: FOURTH FOLLOWUP REPORT (April 1992) *available in* WESTLAW, FINT-ITC Database [hereinafter GREATER ECONOMIC INTEGRATION]. The European Community is actually an amalgamation of "three separate European Communities, each governed by its own Treaty" but administered under a single institutional structure. Mark L. Jones, *Treaty Establishing the European Economic Community*, I.E.L. V-A-1.(A) (1989). The European Community embodies the European Coal and Steel Community (ECSC Treaty), the European Atomic Energy Community (EURATOM Treaty), and the European Economic Community (EEC Treaty). *Id.* The EEC Treaty is "the most important and far-reaching." *Id.* Article 2 of the EEC Treaty states that the purpose is to create a common market, a market based on free trade. *Id.* This stated purposes is similar to that of NAFTA. However, an important feature of the EEC treaty is also a "transfer of sovereign powers" from the participating countries to the Community. *Id.* This differs from that envisioned under NAFTA. See *supra* note 13 and accompanying text. In fact, the EC has a broader reach than NAFTA as it also proposes "political, social, and deeper economic and institutional ties." GREATER ECONOMIC INTEGRATION, *supra*. The EC commits the member nations to political union. *Id.*

134. CRISPO, *supra* note 35, at 174. *Contra* WINHAM, *supra* note 34, at 119 (such

free trade zones will likely be around for a "long stay," and will eventually form around the United States, Japan, and Europe.[135] NAFTA allows the United States to remain competitive with respect to other trading blocks evolving in Europe and Japan.[136] Regional trading blocks are attractive because fewer difficulties arise in implementing free trade within a small, less diverse group of countries.[137] Increased trade and trading agreements among "geographically close countries with cultural similarities" is natural and expected as "the most easily reached."[138] This kind of arrangement operates as a "catalyst" for increased trade and development among the member countries.[139]

a. NAFTA as a free trade zone

NAFTA creates a free trade zone[140] that allows for stronger competitive posture between the members of NAFTA and other newly established regions.[141] NAFTA is fully consistent with the GATT requirements for a free trade area.[142] GATT recognizes the advantages that can be

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arrangements are "prima facie" violative of GATT).

135. Stewart, *supra* note 43, at 70. However, free trade areas are not always beneficial. For example, the European Community envisioned that a "single internal market" would prove economically beneficial to the member nations. U.S. Int'l Trade Comm'n, Pub. No. 2268, THE EFFECTS OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES: FIRST FOLLOW-UP REPORT (Mar. 1990), *available in* WESTLAW, FINT-ITC Database. However, the initial move toward integration was hampered by "stagnating growth, high unemployment, and increased import competition" to the member countries resulting in protectionism, rather than integration. *Id.*

136. Baeza, *supra* note 15, at 259. Some argue that the GATT framework proceeds too slowly and agreements like NAFTA are necessary to promote trade. WINHAM, *supra* note 34, at 119.

137. S. REP. NO. 266, 102d Cong., 2d Sess. 264 (1992).

138. *Id.*

139. Fitch, *supra* note 35, at 356-57. Such an agreement makes the member countries more efficient by "stimulating competition and driving inefficient businesses from the market place." *Id.*

140. "The new NAFTA is clearly a regional FTA, and extending it to South America would undoubtedly stamp it as regionalism par excellence." Jagdish Bhagwati, *Beyond NAFTA: Clinton's Trading Choices*, FOREIGN POL'Y 155 (Summer 1993). For a discussion of possible extension of NAFTA to South America, see *infra* notes 203-19 and accompanying text.

141. Sergio Munoz & Juanita Darling, *Jaime Serra Puche: The Free Trade Agreement From the Mexican Perspective*, L.A. TIMES, Aug. 1, 1993, at M3. Jaime Serra Puche, the head of the Mexican negotiation team to NAFTA, stated: "[T]here will be job creation in the three countries due to the synergy of the three countries' economies. This would make the region more competitive vis-a-vis other regions." *Id.*

142. White House Fact Sheet, Aug. 24, 1992. GATT contains a limited exception for

garnered by trade with neighboring countries.[143] NAFTA was negotiated to be "GATT-consistent."[144] It not only complies with GATT, but provides knowledge that can be used for future improvements to the treaty.[145] Some argue that the Canada-United States Free Trade Agreement, the model for NAFTA,[146] does not supplant GATT, but actually "extend[s] and elaborat[es] the long-standing commitments . . . under the GATT."[147]

President Clinton, in campaigning for NAFTA, regarded the passage of NAFTA as "essential" to the United States effort to remain competitive with Europe and Asia.[148] However, others believe that the creation of a regional trading bloc is unwise.[149] These opponents argue that such regionalism leads other countries to adopt "defensive" tactics such as the creation of further regional blocks that diminish world trade.[150] GATT,

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this kind of arrangement under Article 24 that "allows a group of countries to dismantle all trade barriers only among themselves." Bhagwati, *supra* note 140, at 155. This is one of the "most important" exceptions to the GATT provisions. Abbot, *supra* note 100. NAFTA states under Article 101 that: "The Parties to this Agreement, consistent with Article XXIV of the General Agreement on Tariffs and Trade, hereby establish a free trade area." NAFTA, *supra* note 11, ch. 1, art 101. Furthermore, the participating Parties acknowledge the existence of GATT under Article 103: "The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade . . . ." *Id.* at art. 103.

143. Article XXIV of GATT provides in part that: "The provisions of this Agreement shall not be construed to prevent . . . [a]dvantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic." GATT, *supra* note 83, at Article 24, 3(a).

144. TRADE AND INVESTMENT LIBERALIZATION MEASURES, *supra* note 53.

145. S. REP. NO. 266, 102d Cong., 2d Sess. 264 (1992).

146. *See infra* notes 154-61 and accompanying text.

147. CRISPO, *supra* note 35, at 171.

148. *Clinton Signs NAFTA Side Agreements, Kicks Off Campaign to Pass Legislation*, BNA INT'L TRADE DAILY, Sept. 16, 1993. Clinton noted how international competition to the United States has already gone about "consolidating and creating huge trading blocks." *Id.*

149. Bhagwati, *supra* note 140, at 155.

150. *Id.* They foresee dire consequences of attempting to push the NAFTA agreement southward.

> [I]t will certainly invite a defensive, if not retaliatory, bloc in Asia. Divisions will be sharpened and the world economy fragmented into four blocs: an expanded EC, a NAFTA extended to the Americas, a Japan-centered Asian bloc, and a marginalized group of developing countries, many with low incomes and only just turning to export-oriented strategies. We should not favor that scenario.

Id.

This view can be substantiated by the reaction of the world's other industrial powers to the European Community's effort for further integration. "[T]hird countries, including the United States" foresee a potential creation of "Fortress Europe" that will protect against foreign imports. U.S. INT'L TRADE COMM'N, PUB. NO. 2268, THE EFFECTS

however, allows free trade areas for their desirable consequences of increasing trade among the member countries, and indicates that their purpose should not be for the creation of a defensive position.[151] Yet, others argue further that while NAFTA might fit the technical requirements of a GATT free trade area, it reflects a "diminished U.S. commitment" to GATT and the multilateral trading system.[152]

b. *Canada-United States Free Trade Agreement (FTA),*[153] *precursor to NAFTA*

The United States and Canada have had a free trade agreement since 1989.[154] This agreement, the FTA, complies with the requirements of GATT.[155] Generally, the FTA is thought to have benefitted both countries.[156] Some NAFTA proponents state that NAFTA broadens the FTA by including Mexico,[157] while others indicate that it merely "builds" on

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OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES: FIRST FOLLOW-UP REPORT (Mar. 1990), *available in* WESTLAW, FINT-ITC Database.

151. Article XXIV of GATT provides in part:

> The contracting parties recognize the desirability of increasing free trade through the voluntary development of closer integration between the economies of the parties to such agreements [free trade area agreements]. *They also recognize that the purpose of a . . . free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.*

GATT, *supra* note 83, at Article XXIV, 4 (emphasis added).

152. Odiaga, *supra* note 24, at 141.

153. Canada-United States Free Trade Agreement, Jan. 2, 1985, 27 I.L.M. 281 [hereinafter FTA]. For a discussion of the impact of the FTA, see generally CRISPO, *supra* note 35.

154. John Urguhart, *Canada Businesses Urge Government, Mexico to Adopt NAFTA if U.S. Drops Out*, WALL ST. J., Nov. 15, 1993, at A14.

155. WINHAM, *supra* note 34, at 47 n.7. This FTA did not involve the introduction of protectionist measures between the United States and Canada relative to the rest of the world. *Id.* at 47. *See supra* note 151 and accompanying text.

156. "Traders and investors on both sides of the border" took advantage of the "many opportunities" created by the agreement. Urguhart, *supra* note 154. *But see* David C. Williams, *Letters to the Editor - Higher Wages, Fewer Jobs*, WASH. POST, Sept. 25, 1993, at A20 (indicating that Canada has suffered economically from the deal and that "most Canadians regret the pact").

157. Urguhart, *supra* note 154, at A14. The Canadians were also favorable to trade with Mexico, as Canadian business people favored a Canada-Mexican agreement should NAFTA have failed. *Id.*

the FTA.[158] In any case, the FTA is appropriately known to be the "predecessor" to NAFTA.[159] When the FTA was developed, it was thought to be a singular event and not disruptive of the GATT framework.[160] However, with the passage of NAFTA, it is clear that the United States has adopted regional trading zones as a means of improving trade relations.[161]

III. NORTH AMERICAN FREE TRADE AGREEMENT

A. NAFTA in General

NAFTA represents the "most creative step toward a new world order taken by any group of countries since the end of the Cold War."[162] NAFTA is merely a "logical confirmation" of a process already started and continuing independent of the treaty.[163] The agreement takes advantage of a "remarkable improvement" in the United States ability to compete in the world market.[164] Most significantly, NAFTA captures the Mexican market and potentially the Latin American market for the United States.[165]

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158. Overview: NAFTA, *supra* note 18.

159. Horlick & Debusk, *supra* note 25, at 21. Most applicable to this Comment, the dispute resolution provisions under the FTA have been well documented elsewhere. *See generally* Ton J.M. Zuijdwijk, *Dispute Settlement Mechanisms Under the Free Trade Agreement*, 40 ME. L. REV. 325 (1988); David P. Cluchey, *Dispute Resolution Provisions of the Canada-United States Free Trade Agreement*, 40 ME. L. REV. 335 (1988); Leon E. Trakman, *Privatizing Dispute Resolution Under the Free Trade Agreement: Truth or Fancy?*, 40 ME. L. REV. 349 (1988).

160. WINHAM, *supra* note 34, at 118.

161. *Id.* at 118-19.

162. Henry A. Kissinger, *With NAFTA, U.S. Finally Creates a New World Order*, L.A. TIMES, July 18, 1993, at M2. This agreement does not embody a "conventional trade agreement but the architecture of a new international system." *Id.*

163. Adela de la Torre, *Getting A Piece of the Mexican Rock*, L.A. TIMES, Aug. 11, 1993, at B7. Most "astute" business people view the upcoming years as a great opportunity "for entering the relatively immature Mexican consumer market with fewer competitors." *Id.*

164. Alfred L. Malabre, Jr., *The Outlook: Economy's Slow Pace Masks Competitiveness*, WALL ST. J., Sept. 13, 1993, at A1. America's newly competitive stance can be directly traced to the increasing competitive cost of U.S. labor. *Id.* This increased competitiveness has caused U.S. exports to be the fastest-growing segment of the U.S. economy. *Id.* This merely spurs on America's status as the "world's largest exporter." *Id.*

165. BNA INT'L TRADE DAILY, Sep. 16, 1993. The United States Trade Representative stated forcefully:

> Shame on us if we allow those markets to be taken by others. And surely, if we pull away from those markets by rejecting this agreement, we know who

NAFTA acts to unite "rich and poor nations in a free-trade zone."[166] The issues involved in dealing with developing countries were specifically addressed in GATT.[167] The need for increased trade between developed and developing countries has also been addressed by the United Nations.[168] Agreements such as NAFTA between the industrialized and developing countries have proven beneficial to participating parties in the past.[169] Thus, in linking together the developed country of the United States with the developing country of Mexico, NAFTA can have stabilizing effects for the region as a whole.[170]

> will be there in a moment . . . . I believe I could take this document to the European Community or to the new Japanese government and put it on their desk and it would not take more than five minutes to get their signature on this agreement.

Id.

166. David Hage, *Free Trade: Fear, Frenzy and Facts*, U.S. NEWS & WORLD REP. 65, Sept. 13, 1993. Mr. Hage states that NAFTA, in joining the richer nation of the United States with the poorer nation of Mexico, will likely result in the same outcome as when "the wealthy countries of Europe" accepted the less economically powerful nations of Spain and Portugal into their common market. *Id.* The richer nations benefitted from the deal as liberalized trade increased the wealth of the poorer nations which in turn made "them into bigger export markets for their richer neighbors." *Id.* This scenario could play out extremely well for the United States as Mexico has numerous potential consumers, but without the spendable income. Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement, Free Trade Negotiations with Mexico, Environmental Matters, May 1, 1991, 1991 WL 434200 (N.A.F.T.A.) [hereinafter Response of the Administration: Environmental Matters]. "Mexico has over one-third of the U.S. population, but its economy is only 1/25th the size of ours." *Id.*

167. Abbott, *supra* note 100. These are presented in Article XVIII and Articles XXXVI through XXXVIII. *Id.*

168. In 1964, the United Nations General Assembly established the United Nations Conference on Trade and Development. MCGOVERN, *supra* note 75, at 50. One of the principal functions is "[t]o promote international trade, especially with a view to accelerating economic development, particularly trade between countries at different stages of development . . . ." *Id.*

169. Espana, *supra* note 17, at 42 n.14. The successful partnerships between the European Community and Spain, Portugal, and Greece, as well as the partnership between the United States and Israel attest to this fact. *Id.*

170. STANLEY D. METZGER, LAW AND POLICY MAKING FOR TRADE AMONG "HAVE" AND "HAVE-NOT" NATIONS 1 (John Carey ed. 1968). In 1967, United Nations Secretary-General U. Thant indicated that the most challenging struggle facing the world was lessening the gap between rich and poor nations. *Id.* The Secretary-General felt that the gap existing between the rich and poor nations, between the nations of the North versus the South, was of more concern for the security of the world than the ideological and political gap between the East and West. *Id.* "[I]n the long run what is

B. *Mexico*[171] *as a Trading Partner*

This Comment focuses on trade between the United States and Mexico. Trade between the United States and Canada has already been examined in detail.[172] The trade relationship between the United States and Mexico is extremely significant because of the substantial opportunities available to both countries.[173] As a global power, the United States has interests throughout the world,[174] yet the effect of the Mexico—United States relationship has importance to each other "without parallel elsewhere in the world."[175] Though in the past the relationship had focused on "managing irritants," it is now viewed as one that harbors a unique opportunity for growth.[176] The importance that Mexico will have to America will be preeminent in the next century.[177] Mexico provides a

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much more explosive is the widening gulf between the North and the South." *Id.*

171. Though not approaching the economic might of the United States, Mexico is favorably viewed in Latin America and designated the "Colossus of the North." METZGER, *supra* note 170, at 37. The strengths of Mexico have been succinctly summarized as: "economic growth, financial strength, political stability, world stature, natural resources, trained people, [and] government support." DOING BUSINESS IN MEXICO, *supra* note 15, at 2-5.

172. *See generally* Ann Carlsen, *The Canada-United States Free Trade Agreement: A Bilateral Approach to the Reduction of Trade Barriers*, 12 SUFFOLK TRANSNAT'L L.J. 299 (1989); Amerlia Porges et al., *The U.S.-Canada Free-Trade Agreement*, 82 AM. SOC'Y INT'L L. PROC. 395 (1988).

173. *U.S. Mexico Binational Commission Meets in Mexico City*, DEP'T ST. BULL. 76(6), Oct. 1989, at 76(6). Secretary of State James Baker, announcing a belief held by himself and President Bush, stated that U.S.-Mexico relations had become the most important link in American trade due to the common border and had grown into a unique relationship of exceptional "breadth, complexity, and vibrancy." *Id.* Stated another way, "the United States and Mexico have been dating for years." Susan Dentzer, *The Pain and Gain of Trade*, 113 U.S. NEWS AND WORLD REP. 62, Sept. 28, 1993.

174. In fact, for a greater portion of the twentieth century, United States interests focused on distant countries, rather than neighboring countries. Fitch, *supra* note 35, at 358-59.

175. Alejandro Orgarrio & Leonel Pereznieto Castro, *Mexico-United States Relations: Economic Integration and Foreign Investment*, 12 HOUS. J. INT'L L. 223 (1990) (quoting Rogers, *Approaching Mexico*, 72 FOR. POL. 196 (1988)). "Mexico and the U.S. need each other." DOING BUSINESS IN MEXICO, *supra* note 15, at 5.

176. DEPT. ST. BULL, *supra* note 173. This "managing irritants" may in fact be a kind description as the relationship between the United States and Mexico has been "tainted by conflicting interest, differing conceptual points of view, misunderstandings, clashing passions, and even violence." Ogarrio & Castro, *supra* note 175, at 226.

177. Kissinger, *supra* note 162. "De facto" open borders between our countries, and the nearly twenty million Mexican residents in America inextricably link our countries. *Id.* This huge border provides a valuable opportunity for increased trade between the United States and Mexico. Politicians in the states bordering Mexico were the "biggest backers" of NAFTA when noting the potential for increased trade. *Labor Letter, Southern Union Locals Join the anti-NAFTA Campaign*, WALL ST. J., Sept. 28,

"stellar market" for trade with the United States.[178]

1. NAFTA From Mexico's Perspective

Understanding the need for international trade to compete in the global market,[179] President Salinas of Mexico first moved for the trade pact in 1990.[180] Salinas stated that this opportunity is one that happens "once in a generation."[181] Mexico avidly supports NAFTA as a means to solidi-

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1993, at A1. *See also* Joel Simon, *NAFTA - The View from Tijuana: Free Trade in Mexico*, NATION, Nov. 30, 1992, at 664 (noting how the growth of Tijuana has directly "benefitted its U.S. neighbor, San Diego"). A good portion of wealth earned in Tijuana is later spent in San Diego. *Id.* However, this isn't surprising as Mexico buys American goods; 70 cents of every dollar that Mexico spends on imports is for American goods. Overview: NAFTA, *supra* note 18. *But see* Fitch, *supra* note 35, at 375 (suggesting that besides the common border, the United States and Mexico seemingly have little else in common).

178. Rebecca Reynolds, *Fact Sheet: Mexico - A Solid Market Continues To Serve U.S. Companies*, 4 U.S. DEP'T OF STATE DISPATCH, May 17, 1993, at 353(3). In 1992, Mexico surpassed Japan as the second-largest market for exported United States goods, and presently continues to be the fastest-growing American export market. *Id.* Furthermore, and particularly important to the United States government, the United States ran a trade surplus with Mexico in manufactured goods that was larger than any other trading partner. *Id.*

179. Salinas proposed NAFTA "after a 1990 trip to Europe convinced him that Western European investors were turning to Eastern Europe and that his country needed to attract U.S. businesses." Simon, *supra* note 177.

180. Asra Q. Nomani & Dianne Solis, *NAFTA Is Facing Difficult Trial in the Congress*, WALL ST. J., Aug. 16, 1993, at A3. The Mexican government pushed for NAFTA as "the crowning achievement of sweeping economic reforms." *Id.* Salinas' interest led to joint preparatory work in June 1990 of a Mexican-U.S. agreement under the endorsement of President Bush and President Salinas. White House Fact Sheet, Aug. 24, 1992. Canada later joined the negotiation process in February 1991, when the negotiations became known as NAFTA. *Id.* Formal negotiations commenced in June of 1991. *Id.* On August 12, 1992, the United States, Canada, and Mexico completed formal negotiations of NAFTA. Report of the Administration on NAFTA, *supra* note 19. *See generally* Description of the Proposed North American Free Trade Agreement, Prepared by the Governments of Canada, The United Mexican States, and the United States of America, *available in* WESTLAW, NAFTA Database (providing a synopsis of the agreement as the agreement then stood on August 12, 1992). The parties involved at that time included the Canadian Minister of Industry, Science and Technology and Minister for International Trade Michael Wilson, Mexican Secretary of Trade and Industrial Development Jaime Serra and United States Trade Representative Carla Hills. *Id.*

181. Paul B. Carroll & Dianne Solis, *NAFTA Is an Opportunity the U.S. Shouldn't Miss, Salinas Contends*, WALL ST. J., Aug. 19, 1993, at A6. Salinas contends that NAFTA will improve United States-Mexican relations, and will allow the United

fy its own economic reforms.[182] "After centuries of trying to choke off outside influences," Mexico now accepts foreign goods into its country and believes in its own competitive stance.[183] This practice of trade liberalization has turned the Mexican economy from a "basket case to a success story."[184]

President Salinas stated that Mexico's acceptance of NAFTA "heralds a commitment to fair and competitive development."[185] Due to the dramatic market reforms, exports to Mexico from the United States increased twice as fast as that of U.S. exports to other parts of the world.[186] The United States has a tremendous amount to gain by trading with Mexico and the changes in Mexico's political and economic structure foretell a strong commitment to increased international trade under NAFTA.

2. Mexico's Political Climate

The political climate in Mexico changed dramatically with the election of Carlos Salinas de Gortari as the sixty-fourth President of the United States of Mexico.[187] Under Salinas, the Mexican government has been strongly in favor of NAFTA, and has viewed it as the "centerpiece" of the free market reforms initiated in the country.[188] In addition, political re-

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States to "redefine its relations with all of Latin America." *Id. But see* Linda Robinson, *Reaching to the South: Free Trade Alone Cannot Bring Mexico and the United States Together*, U.S. NEWS & WORLD REP., Mar. 1, 1993, at 43 (NAFTA unlikely to impact the "explosive political issues" that divide the two countries).

182. Asra Q. Nomani & John Urqhart, *Trade Accord's Side Talks Stall Over Sanctions*, WALL ST. J., Aug. 13, 1993, at A3.

183. Matt Moffett, *Mexico Has a Lot Riding on Outcome of the Trade Debate*, WALL ST. J., Sept. 15, 1993, at A18. This signals a "fundamental change in the country's relationship with the rest of the world." *Id. See generally* Espana, *supra* note 17, at 41 (outlining the market reforms undertaken by Mexico).

184. Alan Murray, *The Outlook: Nafta Win is Crucial To Asia Talks Success*, WALL ST. J., Nov. 15, 1993, at A1. This growth parallels that of those nations previously liberalizing their trade. "Trade liberalization has been a major factor contributing to the unprecedented growth of the U.S. and global economies during the last four decades." Response of the Administration, Economic Impact, *supra* note 108.

185. BNA INT'L TRADE DAILY, Sept. 16, 1993. Salinas noted that the Mexican people were ready to "compete with the other economies of this region." *Id.*

186. *White House Fact Sheet on NAFTA*, BUS. AM., Aug. 24, 1992, at 22. Between 1986 and 1991, U.S. exports to Mexico rose from $12.4 billion to $33.3 billion. *Id.*

187. Ignacio Gomez-Palacio, *The New Regulation on Foreign Investment in Mexico: A Difficult Task*, 12 HOUS. J. INT'L L. 253, 253 (1990). In fact, this election may later be seen as the "turning point in the history of modern Mexico." *Id.*

188. Paul B. Carroll & Dianne Solis, *From U.S., Mexican Executives Hear Sound of an Opening Bell*, WALL ST. J., Nov. 19, 1993, at A12. The passage of NAFTA not only benefits Mexico directly in its dealings with the United States and Canada, but also allows Mexico to further concentrate on agreements with other South American coun-

forms have allowed for greater participation by opposition groups.[189] Salinas has taken numerous steps in the past months to improve the political framework in Mexico, including substantial campaign reform efforts.[190] Overall, the political structure in Mexico has undergone beneficial changes and appears receptive to further reform. Yet, some still argue such reforms are insufficient and that trade with Mexico is inappropriate.[191] Under either view, the political system must be taken into account because it has "nurtured" the economic system in the past.[192]

3. Mexico's Economic Climate

Although the United States and Mexico shared strong trade bonds based on physical proximity, they never shared similar economic policies.[193] In the early 1980s, Mexico underwent a dramatic change in economic philosophy that allowed for NAFTA to be proposed and adopted.[194] This change was significant because it occurred due to internal

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tries promoting free trade and investment. *Id.* This furthers the ultimate goal of NAFTA and similar agreements, to advance a hemisphere of free trade.

189. 4 U.S. DEP'T ST. DISPATCH May 17, 1993, at 354.

190. From spending $2 billion to establish voter identification, capping campaign spending to allow greater minority representation, and promoting exit polls to reduce the chances of ballot tampering. Carroll & Solis, *supra* note 181. *But see* Fitch, *supra* note 35, at 379. "[I]n Mexico, corruption is essential to the operation and survival of the political system - the system has never lived without corruption and would disintegrate or change beyond recognition if it tried to do so." *Id.*

191. Arthur Jones, *Free Trade With an Unfree Land*, 29 NATIONAL CATHOLIC REPORTER, April 16, 1993, at 10. *See also* Fitch, *supra* note 35, at 379.

192. Luis Rubio, *Mexico in Perspective: An Essay on Mexico's Economic Reform and the Political Consequences*, 12 HOUS. J. INT'L L. 235 (1990).

193. Barriers in Free Trade, *supra* note 24 at 141.

> U.S. trade and economic policy was based on free-market and free-trade principles, while in Mexico the state intervened in almost every aspect of economic decision making . . . . The NAFTA became possible because of what amounted to an economic revolution, considering where Mexico was before. Without the substantial economic reforms that occurred in Mexico, it is unlikely that the United States would have been willing to pursue NAFTA negotiations.

Id.

194. 3 U.S. DEP'T ST. DISPATCH, Aug. 10, 1992, at 620(2). By rejecting its "traditional economic policies," Mexico's adoption of a free market economy fueled the growth of United States-Mexican economic ties. *Id.* This economic liberalization, which NAFTA will "enshrine and expand", directly increases Mexico's economic growth, which in turn benefits the United States by providing opportunities for exports and investment.

measures taken by the Mexican government, and as such, laid the basis for lasting change.[195] The increased trade between Mexico and the United States would simply not have occurred if Mexico had not made economic reforms.[196] This change in Mexico can not be overstated as Mexico has become "one of the most open, market-oriented developing countries in the world."[197] This reflects a true reversal of identity.[198] The repercussions of this fundamental reversal has had profound effects throughout Mexico's economy.[199]

Yet, it must also be understood that the 1980s were a period of "economic crisis" for Mexico.[200] This economic reform is welcome but should be approached with caution,[201] because up until the early 1980s, the Mexican model of a closed economy and closed political system resulted in surprising growth and stability making Mexico the "envy of other developing nations."[202] It is thus important to note that the "new and improved" Mexico has only been such for a relatively short period of time.

C. *Mexico as Gateway to Increased Trade in Latin America*

Many view NAFTA as a signal indicating a future joining of all the countries of the Americas as "partners seeking mutual prosperity."[203]

Id. For a general outline of the objectives of the Mexican market reform, see Fernando Sanchez Ugarte, *Mexico's New Foreign Investment Climate*, 12 HOUS. J. INT'L L. 243, 248 (1990).

195. METZGER, *supra* note 170, at 8. Such fundamental change, if it is to last, must come from within. "[E]xternal assistance . . . ranging in importance from marginal to substantial assistance, plays a subordinate role to internal self-help measures." *Id.*

196. Espana, *supra* note 17.

197. 4 U.S. DEP'T STATE DISPATCH, May 17, 1993, at 354(3). The reforms include "reducing barriers to trade and foreign investment, privatizing most state enterprises, and improving legal protection for firms doing business in Mexico." *Id.* This was after being deemed one of the "world's most protected" markets. Response of the Administration: Economic Impact, *supra* note 108.

198. "Mexicans, who a generation ago were ardent protectionists, embrace the reforms." *After NAFTA*, ECONOMIST, Mar. 20, 1993, at 71.

199. Matt Moffett, *Ahead of Itself: Mexico's Stock Market Has Grown Fivefold Since 1990; Everything Else Still Has to Catch Up*, WALL ST. J., Sept. 24, 1993, at R8. This article notes how the Mexican stock market, the Bolsa de Valores, was a "penny-ante thing" until relatively recently. *Id.* However, owing in part to the economic reform, the Mexican stock market has seen a "torrent of foreign investment" that has increased the Bolsa fivefold since 1990. *Id.* The Bolsa has become "the world's largest emerging market." *Id.*

200. TRADE AND INVESTMENT LIBERALIZATION MEASURES, *supra* note 144.

201. *Id.*

202. Stephen T. Zamora, *Foreword: Searching for the Mexican Model of Government*, 12 HOUS. J. INT'L L. 181, 182-83 (1990).

203. William R. Rhodes, *The Latin Tigers Are Ready to Roar*, WALL ST. J., Dec. 31,

NAFTA was merely to be a first step in a plan proposed by President Bush,[204] known as the Enterprise for the America's Initiative.[205] Adoption of NAFTA advanced President Bush's "vision of economic growth through free trade" making America more globally competitive.[206] President Clinton also views NAFTA merely as a "first step" indicating that trade advances will also be made to other Latin American states.[207] From the other side, Latin America believes the agreement to also be the

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1993, at A7. A unity of the Americas is possible due to dramatic market changes that have occurred in Latin America, the same type of changes that led to explosive growth in Asia. *Id.* Free market reforms are not limited to Mexico but are also evident in Chile, Argentina, Colombia, Bolivia, Venezuela, Uruguay, and Peru. *Id.* Passage of NAFTA will solidify and encourage these market reforms by developing ties among the Latin countries, thus opening "the way for an era of prosperity in the hemisphere." *Id.*

204. President Bush had a program called the "Enterprise for America's Initiative" (EAI) that was to create an "economic partnership" with Latin America. James Gerstenzang & Art Pine, *Bush Proposes Free Trade With Latin America in New Partnership*, L.A. TIMES, June 28, 1990, at page A9. His goal was to create a "hemisphere-wide free-trade zone" benefitting the economies of the region. *Id.* Bush argued that free trade should replace loans to such countries and would stimulate the economies of the region. *Id.* Bush had stated that "trade, not aid, will draw our two nations [the United States and Mexico] closer together as neighbors with mutual respect for one another." Response of the Administration: Environmental Matters, *supra* note 166. However, others argued that such a plan was "impractical as policy." *New Trade Plan—Or Trade-Off?*, L.A. TIMES, June 29, 1990, at B6. They believed the region too diverse to simply cite increased trade as the remedy and noted that this had been tried in the past without success. *Id.* However viewed, it is clear NAFTA was to be a starting point and that most of the "key provisions" of NAFTA were concluded during President Bush's administration. Kissinger, *supra* note 162. Further, rejection of NAFTA would "almost certainly mark the end of the EAI." Espana, *supra* note 17.

205. This initiative was to "pave the way to free trade throughout the Western Hemisphere." U.S. INT'L TRADE COMM'N, PUB. NO. 2403, OPERATION OF THE TRADE AGREEMENTS PROGRAM 42ND REPORT 1990, (July 1991), *available in* WESTLAW, FINT-ITC Database. The United States entered into preliminary agreements with Bolivia, Chile, Colombia, Ecuador, Honduras, and Costa Rica. *Id.* These agreements were initiated to utilize "the region's wealth of natural, human, and physical assets." *Id.* Additionally, with a population of over 400 million, a vast untouched consumer market was available. *Id.*

206. Overview: NAFTA, *supra* note 18.

207. Bob Davis & Jackie Calmes, *House Approves NAFTA, Providing President With Crucial Victory*, WALL ST. J., Nov. 18, 1993, at A1. While noting that NAFTA is merely the first step towards increased trade, President Clinton also understands the great potential involved as Latin America represents an extremely important market for American goods. *See* BNA INT'L DAILY, *supra* note 39.

initial step in integrating "all countries of the Western hemisphere."[208] Others have proposed that NAFTA can provide a model to establish a trading zone with the Pacific Rim.[209]

This area has shown and can again show significant growth for the United States.[210] President Clinton believes that the political and economic reforms of the area make it a prime location for further trade.[211] Other government leaders have echoed this belief.[212] Mexico can lead the way by providing the "economic model" for the region.[213] In fact, many Latin American countries have already chosen "free-market, outward-looking economic reforms along Mexican lines."[214] "Almost overnight," a highly protected region of the world became one of the "most open to trade."[215] As with Mexico, the area has undergone an "economic rebirth."[216]

The United States must become involved in trade with the region if it is to flourish. A regional trading area is generally not successful unless

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208. Espana, *supra* note 17.

209. Congressman David Dreier indicated NAFTA should provide a start for "expanding a free trade regime to include other countries in Latin America and the Pacific Rim." H.R. REP. NO. 128(II), 103d Cong., 1st Sess 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 309, 309.

210. Latin America experienced a 6% economic growth rate throughout the 1960s and 1970s. *The Resurgence of Democracy in Latin America*, Jan. 1985, at 65. This represented "steady, strong, and substantial" growth. *Id.* The Latin American market is the United States' fastest-growing export market. Stewart, *supra* note 43. This can all be traced to the "impressive strides" that Latin American countries have made in reforming their economies. Naim, *supra* note 39.

211. 4 U.S. DEP'T ST. DISPATCH, May 17, 1993, at 354. The rate of growth of exports to the area is three times faster than that to the rest of the world. *Id.*

212. *For the Record*, WASH. POST, Sept. 26, 1993, at C6. Commerce Secretary Ron Brown proposes that the United States must make a "particular effort to explore and open new and emerging markets." *Id.* After noting the importance of NAFTA, Brown indicates it should be America's new goal to create a "hemispheric free trade zone." *Id.*

213. U.S. DEP'T ST. DISPATCH, *supra* note 211.

214. Keatley, *supra* note 60. In fact, many nations in Latin America consider eventual membership in a region wide free trade pact as "vital" to their economic future. *Id.*

215. Naim, *supra* note 39. In fact, "almost all" of the Latin America countries have adopted market reforms with the same general direction of "more markets, less state." *Id.* However, this article indicates that such changes were dramatic for the region, and the area needs time to adjust to a newly created market format. *Id.* Other countries cannot expect the area to be a huge trading success from the outset. *Id.*

216. Tom Petruno, *Hot, Healthier Latin Markets Attracting Cash*, L.A. TIMES, Feb. 9, 1994, at D3. The area's potential has resulted in a large inflow of investor money. *Id.* "Passage of the North American Free Trade Agreement . . . helped refocus investors not just on Mexico, but on all Latin economies." *Id.*; *see supra* note 199 and accompanying text for the impact NAFTA had on the Mexican stock market.

obtaining "trade diversion from outside sources."[217] For successful and sustainable growth in lesser developed countries, a developed country, such as the United States, must be involved in the trade expansion.[218] In the past, efforts to trade merely among Latin American countries were only moderately successful because a developed country was not involved.[219]

IV. INTERNATIONAL COMMERCIAL ARBITRATION

A. *General Introduction*

NAFTA relies primarily on international arbitration as a means of dispute resolution for international commercial disputes.[220] This system of international commercial arbitration developed as a way of efficiently re solving international trade disputes without having to proceed under national court systems with the attendant delays and uncertainties.[221] International commercial arbitration removed the uncertainty surrounding international trade.[222] It was believed that national courts of trading countries could not be "relied on to resolve commercial conflicts fairly and promptly."[223] An international body dealing with international com-

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217. METZGER, *supra* note 170, at 35.

218. *Id.* at 36.

219. For example, in 1960, the Latin America Free Trade Area was established by the Treaty of Montevideo that initially linked nine, and later eleven Latin American countries. *Id.* at 35-36. After initial gains, growth leveled off and it became clear that trade occurring only among lesser developed countries did not cause significant growth, which would have resulted in trade with a developed partner. *Id.* at 35-36.

220. *See infra* note 321 and accompanying text.

221. Charles G. Fenwick, *Inter-American Commercial Arbitration*, *in* INTERNATIONAL TRADE ARBITRATION 181 (Martin Domke ed. 1958).

222. Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 236 (1986). This article notes that although arbitration is "no longer necessarily less expensive . . . nor . . . faster" than court litigation, it still allows the parties to "avoid the uncertainties and complexities of foreign litigation." *Id.*

223. Naim, *supra* note 39. The reasons for avoiding foreign courts included:

> Unpredictability of the enforcement of any judgement rendered; fear of not being treated impartially in the other party's country; concern that their disputes will be aired in public; concern that the lack of technical expertise in a jury will lead to an improper result; and, the realization that court proceedings are almost always expensive and extremely time consuming.

Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative For Resolving Com-*

mercial disputes does not exist, thus businesspeople can only resort to national courts or international arbitration.[224]

However, even with the benefits of international commercial arbitration, disputes still were subject, in part, to differing national court systems. A greater degree of certainty in international arbitration was obtained by the adoption of international conventions related to arbitration.[225] The recognized need for establishing a framework related to international commercial arbitration through international conventions paralleled the growth of "global markets and the growing economic interdependence of nations" that resulted after the end of the Second World War.[226]

In sum, arbitration has become "the agreed means of dispute settlement" with regard to international transactions.[227] The use of arbitration provides an "effective way to secure impartial resolution" of disputes occurring between trading parties.[228] Various sources exist examining how international commercial arbitration operates.[229] Additionally, a host of arbitral institutions can be consulted as further resources.[230]

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mercial Disputes Between Mexican and U.S. Businessmen, 22 ST. MARY'S L.J. 718, 724 (1991).

224. ALAN REDFERN & MARTIN HUNTER, THE LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 19 (1986). Between national courts and international arbitration, "the balance comes down firmly in favor of arbitration." *Id.*

225. RENE DAVID, ARBITRATION IN INTERNATIONAL TRADE 383 (1985). See *infra* notes 269-302 and accompanying text for a discussion of such conventions. The means by which foreign judgements were rendered in differing countries was unsatisfactory to business people, who strongly advocated the adoption of international conventions. *Id.* at 385. International conventions have, to a large extent, resolved the problem of the execution of foreign arbitral awards. *Id.* at 394.

226. VRATISLAV PECHOTA, WORLD ARBITRATION REPORTER 23.0 (1987). See *supra* notes 83-98 and accompanying text for discussion of the growth of global markets occurring after World War II.

227. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 Reporter's Notes 1 (1987).

228. *Id.*

229. *See, e.g.*, ISAAK I. DORE, ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS (1986). This source attempts to present the "overarching scheme" the United Nations Commission on International Trade Law has adopted to provide for the "peaceful settlement of international trade disputes." *Id.*

230. For example, "the International Chamber of Commerce, the American Arbitration Association, the London Court of Arbitration, the Japan Commercial Arbitration Association, the Arbitration Association of the Stockholm Chamber of Commerce, the Inter-American Commercial Arbitration Commission" are all well-known. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 487 reporter's note 4. *See generally* HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE (E. Cohn et al. eds. 1977).

B. International Commercial Arbitration and the United States

Arbitration has recently won increasing favor. The former president of the American Bar Association signaled approval for the arbitration process[231] and former Chief Justice Burger has been outspoken in its support.[232] Additionally, the United States has wholeheartedly accepted arbitration in the field of international commercial dealings.

The United States is signatory to both of the international arbitration conventions specifically provided for in NAFTA.[233] Foreign arbitral awards are "freely enforced" in the United States[234] and the nation has adopted international commercial arbitration to such an extent that it is deemed one of the biggest supporters of this method of trade dispute settlement.[235] The United States follows an international norm of actively enforcing arbitration agreements and awards used in international commercial disputes.[236]

The use of arbitration in international business benefits parties engaged in an international business deal by providing a means whereby

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231. *ABA Officer: ADR Has Come Into Its Own*, ARB. J., Mar. 1991, at 3. Talbot D'Alemberte, then president-elect of the ABA, expressed his approval of the arbitration process in a speech given to the American Arbitration Association. *Id.*

232. *Using Arbitration to Achieve Justice*, ARB. J., Dec. 1985, at 3, 6. Chief Justice Burger, in an address to the American Arbitration Association and the Minnesota State Bar Association in 1985, commented: "My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases." *Id.*

233. *See infra* notes 269-302 and accompanying text.

234. Even in instances where an arbitration award has not been specifically provided for by statute, the United States recognizes the award to the same extent as foreign judgments. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 487 reporter's note 8. Foreign arbitral awards are generally "only refused on grounds that would justify refusal to recognize or enforce foreign judgments." *Id.*

235. S. REP. NO. 266, 102d Cong., 2d Sess. 262 (1992).

236. *International Commercial Arbitration and International Public Policy*, 81 AM. SOC'Y INT'L L. PROC. 372, 375-76 (1987). This is partly symbolized by the fact that United States courts refer to arbitral awards made outside the United States as "international" arbitration awards rather than "foreign" awards. *Id.* 376. An additional factor contributing to U.S. Support of international arbitration is that the UNICTRAL Model Law on International Commercial Arbitration "parallels existing United States law." THE INTERNATIONAL ARBITRATION KIT 101 (Laura Ferris Brown ed., 3d ed. 1986). If so, the United States has clearly adopted an international approach as the Model Law was intended to establish a uniform international practice and procedure, thus removing arbitration from the "parochial law of any adopting state." *Id.*; *see also* HANS SMIT & VRATISLAV PECHOTA, WORLD ARBITRATION REPORTER 2814 (1993) (noting U.S. "federal arbitration law to be strongly supportive of international arbitration").

they "can choose the forum, the rules of procedure, and the applicable law" for any dispute that could arise.[237] All that is required is a well-drafted arbitration agreement or clause in the contract between the parties. However, the advantages and benefits of arbitration are illusory unless these well-tailored, specific agreements are then enforced. "For arbitration agreements to be effective . . . national courts must be able to enforce agreements to arbitrate and the ensuing arbitral awards."[238] The agreements that NAFTA references, the New York Convention[239] and the Inter-American Convention,[240] are well-established multilateral agreements that attempt to accomplish this goal.[241]

Apart from these two conventions, the United States has also established numerous other bilateral commercial treaties that allow for the en forcement and recognition of arbitration agreements and awards.[242] These treaties achieve the same goals of enforcement and recognition of arbitration agreements and awards and apply to countries that are not members of the New York Convention or Inter-American Convention.[243] As the United States has indicated support for international commercial arbitration in both statutory and case law,[244] an examination of both sources is warranted.

1. U.S. Precedent

As early as the 1850s, the United States judiciary indicated a willingness to give favorable consideration to arbitration as a means of dispute

237. H.R. REP. NO. 501, 101st Cong., 2d Sess. 4 (1990).

238. *Id.*

239. *See infra* notes 269-88 and accompanying text.

240. *See infra* notes 289-300 and accompanying text.

241. H.R. REP. NO. 501, 101st Cong., 2d Sess. 4 (1990).

242. THE INTERNATIONAL ARBITRATION KIT, *supra* note 236, at 53. Since 1950, 18 commercial treaties have been formed to establish arbitration as a primary means of resolving international commercial disputes. *Id.*; *see also* 2A SMIT & PECHOTA, *supra* note 236, at 2815-16 (U.S. has concluded a number of such treaties dealing with arbitration). On the other hand, Mexico has not entered into any such treaties dealing with arbitration. *Id.* at 2061. Rather, Mexico relies primarily on multilateral conventions, such as the New York Convention and the Inter-American Convention. *Id.*

243. Such limited treaties "enable countries not ready to adhere to multilateral conventions on arbitration to provide for enforcement and recognition of arbitration agreements and awards." 1 SMIT & PECHOTA, *supra* note 236, at 275. The use of such limited treaties provides "flexibility" thus allowing the parties involved to tailor the treaty to "their respective needs and stages of development." *Id.* at 276. They will likely continue to be used in the international commercial arbitration field. *Id.*

244. Howard M. Holtzmann, *The Importance of Choosing the Right Place to Arbitrate an International Case*, THE INTERNATIONAL ARBITRATION KIT 119, 155 (1986).

resolution.[245] Recent cases also reflect this policy, especially in cases involving international trade.[246]

The scale and dynamic nature of international trade was forcefully pre sented in *M/S Bremen v. Zapata Off-Shore Co.*[247] In *M/S Bremen*, the Supreme Court upheld the use of a forum selection clause in an international business transaction between Zapata, a Houston-based American corporation, and Unterweser, a German corporation.[248] The Court specifically noted the increase of international trade in the world.[249] Significantly, the Court also noted that for U.S. business to thrive in this new environment, parties need to be given more flexibility to indicate how they want disputes to be handled.[250] The Court held that the use of the clause at issue was an essential element of this international deal and should be respected as it was an "effort to eliminate all uncertainty."[251]

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245. Burchell v. Marsh, 58 U.S. 344 (1854) (noting that arbitration as a mode of settlement should be encouraged). Yet, this can not be said to be the prevalent view in early American jurisprudence as "arbitration was initially viewed by U.S. courts with suspicion, as an attempt to oust them of jurisdiction." 2A SMIT & PECHOTA, *supra* note 236, at 2813.

246. *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974); McCreary Tire and Rubber Co. v. CEAT, S.p.A., 501 F.2d 1032 (3d Cir. 1974); Southland Corp. v. Keating, 465 U.S. 1 (1984); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 73 U.S. 614 (1985); Shearson/American Express, Inc. v McMahon, 482 U.S. 220 (1987).

247. 407 U.S. 1 (1972).

248. *Id.* at 2, 15.

249. *Id.* at 12 (businesses operate in "world markets").

250. *Id.* at 8-9. The specific language of the Court reads:

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so . . . . The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Id. at 9.

251. *Id.* at 14 n.15.

In *Scherk v. Alberto-Culver Co.*[252] the Court built upon its *M/S Breman* decision and looked favorably to international arbitration as a means of obtaining certainty in international commercial dealings.[253] In *Scherk*, a contract was established between Scherk, a German citizen, and Alberto-Culver, an American company, whereby Alberto-Culver obtained Scherk's property interests in three distinct business entities.[254] The contract contained an arbitration clause stating that any disputes would be resolved by the International Chamber of Commerce in Paris, France.[255] The business interests transferred were not as represented by Sherk and a dispute arose.[256] The Court upheld the arbitration agreement, noting that arbitration agreements advance a strong policy by acting as an "indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[257]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,[258] the Supreme Court determined the validity of an arbitration clause used in an international commercial transaction when the claim to be arbitrated was an antitrust claim arising under the Sherman Act.[259] After noting the "fundamental importance" that antitrust law plays in America, the Court held that such concerns were properly subject to international arbitration.[260] The Court stated that the "international cast of a transaction . . . add[s] an element of uncertainty to dispute resolution" and that international arbitration was increasingly useful to remove this uncertainty.[261] The Court noted that although international arbitration was still in a formative stage and relatively untested, the advantages of such process warranted its use.[262] In concluding antitrust claims were properly subject to arbitration, the Court stated that "concerns of international comity, respect for the capacities of foreign and international tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [to arbitrate]."[263] Clearly, the United States judiciary

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252. 417 U.S. 506 (1974).
253. *Id.* at 516, 519-20.
254. *Id.* at 508.
255. *Id.*
256. *Id.* at 509.
257. *Id.* at 516, 519-20.
258. 473 U.S. 614 (1985).
259. *Id.* at 616.
260. *Id.* at 634, 640.
261. *Id.* at 636, 638.
262. *Id.* at 638-39.
263. *Id.* at 629. *See generally* Jill A. Pietrowski, *Enforcing International Commercial Arbitration Agreements-Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U. L. REV. 57 (1986).

has recognized and accepted international commercial arbitration as a means to resolve international business disputes.

2. United States Statutes

Matters of foreign commerce and arbitration are governed by the Federal Arbitration Act (FAA) embodied in Title 9 of the United States Code.[264] Where international matters are an issue, the FAA prevails over state law.[265] The FAA seeks to place arbitration on solid ground as a legitimate means of dispute resolution.[266] The FAA established the United States general policy of favoring arbitration.

Apart from the FAA, the stability of international commercial arbitration was greatly advanced with the advent of the following two conventions, both provided for in NAFTA. Prior to this time, enforcing an arbitration agreement or award had to be done in local courts under "domestic arbitration law."[267] This did not lend itself to any degree of certainty and hampered the resolution of international commercial disputes.[268]

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264. 2A SMIT & PECHOTA, *supra* note 236, at 2813. Chapter 1 was enacted in 1925, and amended in 1947 and 1988 and lays out the general United States policy that favors arbitration. *Id.* Chapter 2 was included in 1970 and acknowledges the U.S. commitment to the New York Convention. *Id.* See *infra* notes 269-88 and accompanying text for discussion of New York Convention. Chapter 3 was included in 1990 and reflects the U.S. commitment to the Inter-American Convention. 2A SMIT & PECHOTA, *supra* note 236, at 2813. See *infra* notes 289-300 and accompanying text for discussion of Inter-American Convention.

265. 2A SMIT & PECHOTA, *supra* note 236, at 2815. Some states recently enacted legislation that also deals with international arbitration. *Id.* It is not yet clear how these state enactments will coexist with the FAA. They may, however, apply if there is no direct conflict with the FAA and if the state regulations "fill gaps" not in opposition to the general thrust of the FAA. *Id.*

266. A House Report, commenting on the FAA before its enactment, stated:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924).

267. 1 SMIT & PECHOTA, *supra* note 236, at 230.

268. *Id.*

a. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[269]

The New York Convention is codified in Chapter 2 of Title 9 of the United States Code.[270] The New York Convention became the law of the United States on December 29, 1970.[271] The United States applies this Convention to any arbitration agreement or award arising out of a "commercial" legal relationship.[272] Though the broad language of the Convention can be applied to all transactions, commercial or not, it was modified by the United States to apply only to commercial transactions.[273]

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269. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. [hereinafter the New York Convention].

270. "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." 9 U.S.C. § 201 (1988).

271. *Id. See generally* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961). The United States had ratified the New York Convention on July 31, 1970. Act of July 31, 1970, Pub. L. No. 91-368, 1970 U.S. Code Cong. & Admin. News (84 Stat.) 809, 811.

272. 9 U.S.C. § 202 (1988). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 487 (1987) (noting that the New York Convention handles legal relationships that are "commercial in character"). However, the United States position is in the minority as "most" states apply the Convention to "all private arbitral agreements, regardless of the subject matter." *Id.* at cmt. f.

273. Article II of the New York Convention provides:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

New York Convention, *supra* note 269, at Article II.

In adopting the New York Convention, the United States made a reservation that provided in part: "The United States shall apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the United States." *Id.* Thus, the United States limited the New York Convention's application to commercial transactions. However, a reservation was not necessary for the Inter-American Convention, as its provisions apply only to commercial transactions. *See infra* note 293 and accompanying text.

The United States reservation limiting application of the New York Convention was considered "compatible with the purposes of the Convention" and thus allowed. 1 SMIT & PECHIOTA, *supra* note 236, at 26. Only this, and one other reservation, were deemed appropriate; all other reservations were "discouraged" as incompatible with the goal of the New York Convention. *Id.* Thirty-nine other countries have also made this reservation. Y.B. COM. ARB. - 1993 325 n.2 (Albert Jan Van Den Berg ed. 1993).

The Vienna Convention on the Law of Treaties of 1969 defines a reservation as: "[A] unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, where it purports to exclude or

The Convention only applies to arbitration agreements or awards between a United States citizen and a foreign party.[274]

The district courts of the United States have original jurisdiction over any matters arising under international treaties. Thus, any lawsuits subject to the New York Convention fall within their purview.[275] The federal courts have jurisdiction "regardless of the citizenship of the parties or the amount in controversy."[276] Further, when an action relates to the New York Convention, and it is initially filed in a state court, the lawsuit may be removed to the federal district court at any time before trial.[277]

Most importantly, the codified sections provide for methods by which arbitration can be compelled,[278] and later for confirmation of the result-

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to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

274. Section 202 of Title 9 provides:

> An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

9 U.S.C. § 202 (1988).

275. 9 U.S.C. § 203 (1988). Section 203 provides that: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." *Id.*

This provision naturally results from Article III of the Constitution. Section 1 of Article III in part provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Section 2, clause 1 of Article III in part provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made . . . ." U.S. CONST. art. III, § 2, cl. 1.

276. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 cmt. a. (1987).

277. 9 U.S.C. § 205 (1988). The action may be removed to federal court at any time before trial, whether or not the Convention appears applicable based on the complaint. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 cmt. a. (1987).

278. 9 U.S.C. § 206 (1988). Section 206 provides, "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." *Id.*

ing arbitral award.[279] A court must stay or dismiss an action should the New York Convention mandate that the controversy be arbitrated.[280]

Enforcement of an arbitral award has significant import as a "matter of international obligation."[281] Accordingly, the New York Convention recognizes that such awards are binding and enforceable.[282] Most court decisions in the United States strongly favor enforcement of international arbitration awards upholding the "spirit of the Convention."[283]

i. History of New York Convention

The New York Convention was adopted during a United Nations Conference in mid-1958, and became effective on June 7, 1959.[284] Although participating in the conference, the United States did not fully support the agreement at that time; however, increasing support of the New York Convention led the United States to accede to the Convention in early 1968.[285] The United States' adoption of the Convention was a result of the fact that the Convention had support from numerous influential bodies.[286] The Convention was felt to "serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which could be enforced in both U.S. and foreign courts."[287] The New York Convention was signifi-

279. 9 U.S.C. § 207 (1988). Three years after an award is obtained, an order may be requested confirming the award. *Id.* The court "shall" confirm the award unless finding a proscribed reason for refusal. *Id.*

280. "[A] court . . . must, at the request of any party to an action, stay or dismiss the action pending arbitration if an agreement to arbitrate falling under the Convention is in effect and covers the controversy on which the action is based." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487(2) (1987).

281. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 cmt. c. (1987). As a matter of international obligation, enforcement of such awards are governed by federal law. *Id.*

282. Article III of the New York Convention in part provides: "Each Contracting State shall recognize arbitral awards as binding and enforce them . . . ." New York Convention, *supra* note 269, at Article III.

283. Courts have given weight to the "congressional policy, evidenced by U.S. accession to the Convention, of favoring arbitration of international commercial disputes." 2A SMIT & PECHOTA, *supra* note 236, at 2842.

284. H.R. REP. NO. 1181, 91st Cong., 2d Sess. 1 (1970).

285. The Convention was submitted to the Senate for advice and consent on April 25, 1968.

286. These parties included the "American Bar Association, the Association of the Bar of the City of New York, the American Arbitration Association, the Inter-American Commercial Arbitration Commission, the International Chamber of Commerce, Office and Professional Employees International Union, the Department of State, the Department of Justice, and the Bureau of the Budget." *Id.*

287. *Id.*

cant in that it was one of the first efforts to promote uniformity in international commercial arbitration.[288]

b. Inter-American Convention on International Commercial Arbitration[289]

The Inter-American Convention or "Panama Convention" is codified in Chapter 3 of Title 9 of the United States Code Annotated.[290] It came into force in the United States on October 27, 1990.[291] The terms of this agreement are "substantially similar" to the New York Convention[292] and, like the New York Convention, the Inter-American Convention applies only to commercial transactions.[293] The two conventions were "intended to achieve the same results, and their key provisions adopt the same standards."[294] The Inter-American Convention also recognizes the binding nature of arbitral awards.[295] In fact, the New York Convention and Inter-American Convention were felt to be so similar that Congress expected a "general uniformity of results" under either convention.[296] This is significant as any disputes arising between a United States businessperson and a Mexican businessperson would likely be handled under the Inter-American Convention.[297]

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288. Ronald A. Brand, *UNCITRAL Model Law on International Commercial Arbitration*, I.E.L. VIII-D (January 1991).

289. Inter-American Convention on International and Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 [hereinafter the Inter-American Convention].

290. "The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter." 9 U.S.C. § 301 (Supp. 1992).

291. *Id.* The United States ratified the convention on August 15, 1990. The Inter-American Convention on International Commercial Arbitration, Pub. L. No. 101-39, 104 Stat. 675 (1990).

292. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 reporter's notes 2 (1987). *See also* H.R. REP. NO. 501, 101st Cong., 2d Sess. (1990) (Inter-American Convention "modeled" after New York Convention).

293. Article 1 of the Inter-American Convention relates to "an agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid." Inter-American Convention, *supra* note 289, at Article 1.

294. H.R. REP. NO. 501, 101st Cong., 2d Sess. 5 (1990).

295. Article 4 of the Inter-American Convention provides in part: "An arbitral decision or award . . . shall have the force of a final judicial judgement." Inter-American Convention, *supra* note 289, at Article 4.

296. H.R. REP. NO. 501, 101st Cong., 2d Sess. 5 (1990).

297. In ratifying the Inter-American Convention, the United States made the follow-

i. History of Inter-American Convention

The Inter-American Convention was adopted in 1975 at a conference of the Organization of American States.[298] Although the Convention was strongly supported by the United States, it did not receive Senate advice and consent until October 9, 1986.[299] The support for the Inter-American convention was based on the fact that it was thought to provide a "dependable mechanism" for resolving commercial disputes arising between Latin American and U.S. business entities.[300]

The significance of the New York Convention and the Inter-American Convention is that they provide a "clear legal basis" for enforcement of arbitral agreements and awards, and thus add stability to international economic relations.[301] They operate together to form a "unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations."[302]

V. PRIVATE COMMERCIAL DISPUTE SETTLEMENT UNDER NAFTA

A. *NAFTA Strives for Alternative Dispute Resolution*

NAFTA encourages to "the maximum extent possible . . . the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area."[303] In addition to arbitration, the methods available

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ing reservation:

> Unless there is an express agreement among the parties to an arbitration agreement to the contrary, where the requirements for application of both the Inter-American Convention on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards are met, if a majority of such parties are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are member states of the Organization of American States, the Inter-American Convention shall apply. In all other cases, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall apply.

9 U.S.C. § 301 (1992).

Thus, assuming no express agreement to the contrary, a dispute arising between an American businessperson and a Mexican businessperson would be handled under the Inter-American Convention.

298. *See* H.R. REP. NO. 501, 101st Cong., 2d Sess. 5 (1990).

299. *Id.*

300. *Id.*

301. Camp, Jr., *supra* note 223, at 723.

302. 1 SMIT & PECHOTA, *supra* note 236, at 31.

303. NAFTA, *supra* note 11, art. 2022.

include negotiation, mediation, and conciliation.[304] These methods arrange themselves "along a continuum" to the degree that they differ from typical adjudication in court systems.[305] However, the methods referenced all rely on consent, that is the parties involved must consent to the process and the procedures to be utilized.[306] Consenting to the process establishes a "proclivity to accommodation," an essential first step in resolving the dispute at hand.[307] Merely engaging in such efforts establishes the two sides of the dispute, and by establishing such, starts to resolve the matter as the two positions are then communicated and understood.[308] Moreover, these methods of alternative dispute resolution have become almost "obligatory" in nature when the disputing parties have a great deal at stake, such as an important or vital international business deal.[309]

1. Conciliation[310] and Mediation[311]

Though not defined, NAFTA calls for the use of "other means" of dispute resolution. Some commentators have interpreted that language to

304. Rief, *supra* note 131, at 579.

305. SURVEY OF INTERNATIONAL ARBITRATIONS 1794 - 1989 vii (A.M. Stuyt ed., 3d ed. 1990). Arbitration is the closest to typical adjudication, with mediation and conciliation further removed. *Id.*

306. *Id.* at 578.

307. LILLIAN L. RANDOLPH, THIRD-PARTY SETTLEMENT OF DISPUTES IN THEORY AND PRACTICE 2 (1973).

308. *Id.* at 3-4.

309. *Id.* at 13.

310. Conciliation is defined as, "The adjustment and settlement of a dispute in a friendly, unantagonistic manner." BLACK'S LAW DICTIONARY 289 (6th ed. 1990). The United Nations Commission on International Trade Law has published conciliation rules should the businessperson seek conciliation. These rules recommend that parties to international transactions insert the following clause in the contract: "Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force." INTERNATIONAL ARBITRATION KIT, *supra* note 236, at 266.

311. Mediation is defined as, "Private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties." BLACK'S LAW DICTIONARY 981 (6th ed. 1990). Mediators function to: (1) reduce emotion, by depersonalizing a dispute, (2) promote discussion, (3) facilitate the use of confidential information, (4) focus issues and identify interests, (5) generate new options, and (6) reduce conflict aftermath. Phillips and Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231, 1234 (1983).

mean that NAFTA encourages the use of conciliation and mediation for resolving international commercial disputes.[312] However, arbitration is the "principal means" of resolving such disputes, and conciliation and mediation are generally seen merely as additional means to resolve conflicts.[313] Yet, these long-tested, informal methods[314] increase understanding among the parties and have viable use in the international trade context.[315]

These two informal methods of dispute settlement are advantageous because they are less costly and more expeditious than other settlement methods.[316] However, conciliation and mediation are limited by the fact that they are "non-binding in effect."[317] Thus, they are fundamentally different than arbitration, which results in a binding decision.[318] Apart from providing a theoretical basis for the resolution of international commercial disputes, these methods, conciliation and mediation, "are little used in current practice."[319]

2. Arbitration[320] as Primary Source

NAFTA specifically mentions arbitration as a means of dispute resolution in Article 2022.[321] Article 2022 also refers to both the New York Convention and the Inter-American Convention.[322] Thus, it would seem NAFTA relies on arbitration as the primary source to resolve international commercial disputes.

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312. *See generally* Tobi P. Dress, *International Commercial Mediation and Conciliation*, 10 LOY. L.A. INT'L & COMP. L.J. 569 (1988).

313. *Id.* at 573.

314. Conciliation has existed since the end of the First World War; mediation was adopted at the First Hague Peace Conference in 1899. SURVEY OF INTERNATIONAL ARBITRATIONS, *supra* note 305, at xiv-xv.

315. *Id.* at 581.

316. Rief, *supra* note 131, at 634.

317. *Id.* at 580.

318. *Id.* at 581. *See also* REDFERN & HUNTER, *supra* note 224, at 5-6. Arbitrators are "to decide the dispute, not to act as mediators or conciliators." *Id.* at 17 n.69.

319. *Id.* at 21.

320. BLACK'S LAW DICTIONARY defines arbitration in part as:

> A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard . . . An arrangement for taking and abiding by the judgment of selected persons in some dispute matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation.

BLACK'S LAW DICTIONARY 105 (6th ed. 1990).

321. NAFTA, *supra* note 11, art. 2022(1).

322. *Id.* art. 2022(3).

Arbitration has been argued to be the most appropriate method to resolve disputes in trade relations between Mexico and the United States. Increasing trade between Mexico and the United States will inevitably lead to a "corresponding increase in private commercial disputes," and binding arbitration offers the best solution.[323] The necessity for a definitive and binding resolution procedure for private commercial disputes is especially clear in this relationship due to the great differences in the legal systems of the two countries.[324] Well-versed businesspeople involved in United States and Mexican trade have turned "with increasing frequency" to binding arbitration as the most efficient means to resolve international commercial disputes.[325]

The vast differences in the legal systems in the United States and Mexico create uncertainty for the businessperson which must be lessened if trade is to flourish. Binding arbitration provides the means to reduce the uncertainty.

B. NAFTA Dispute Resolution Provisions Applied to Trade with Mexico

Mexico has long recognized arbitration as a legitimate means of dispute settlement.[326] In Mexico, commercial law is within the jurisdiction

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323. Camp, Jr., *supra* note 223, at 718.

324. The legal systems differ at their most fundamental level. *Id.* at 720. The United States common law legal system relies on the process of stare decisis by which law is created through the process of deciding cases. *Id.* BLACK'S LAW DICTIONARY defines stare decisis as: "To abide by, or adhere to, decided cases." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). On the other hand, the Mexican legal system, a civil system, relies on extensive codes, which are applied as necessary to situations that arise. Camp, Jr., *supra* note 223, at 718. Because the process by which legal issues are addressed is fundamentally different, it necessarily affects the resolution of disputes. *Id.*; *see also* Frederick R. Anderson & Claudio Grossman, *Lawyers and the Rule of Law in the Western Hemisphere*, *in* INVESTMENT AND TRADE IN ARGENTINA, BRAZIL, CHILE, MEXICO AND VENEZUELA 191 n.13 (PLI Commercial Law & Practice Handbook Series 1992) (stating that civil law does "not recognize" stare decisis).

325. Fagan & Arreola, *supra* note 30, at 804-05. The factors favoring international arbitration are: (1) predictability: the dispute will be resolved impartially, not by courts of one or the other nation, (2) competence: the arbitrators will likely have applicable knowledge and expertise of the matter at issue, (3) party participation: the parties engaged in the business deal can shape how the process will occur, (4) finality: the decision rendered should be final and not subject to attack, (5) enforceability: the award should be enforceable in courts in either the United States or Mexico, and (6) cost: the cost of arbitration arguably is less than that of full litigation in national court systems. *Id.*

326. 2A SMITH & PECHIOTA, *supra* note 236, at 2059. One of the oldest codes of

of the Mexican Congress; arbitration of commercial disputes is therefore subject to federal law.[327] Mexican federal law is the exclusive law in the enforcement of foreign and international awards.[328]

Mexico has continued its leadership role of Latin America[329] in the field of international commercial arbitration.[330] Mexico is party to both the New York Convention[331] and the Inter-American Convention.[332] Article 133 of the Mexican Constitution requires that treaties to which Mexico is a party are the "law of the land."[333] Thus, both the New York Convention[334] and the Inter-American convention are part of Mexican law,[335] and international commercial arbitration can proceed under either.

International commercial arbitration is a viable alternative in Mexico, especially due to recent reforms in the legal structure.[336] Mexico has arbitral institutions, a number of experienced arbitrators, and facilities; however, Mexico is still rather inexperienced in the field of international commercial arbitration.[337] Thus, although arbitration can be performed

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Spanish law, in existence since 1171, which later became part of Mexican law stated: "No man ought to be a judge, except one . . . agreed upon by the parties." *Id.* The constitutional origin of arbitration in Mexico traces back as far as 1824 in article 156 of the Mexican constitution. *Id.*

327. *Id.*

328. As international relations comes within the "exclusive sphere" of the federal government's power, only federal law applies to these type of awards. 2A SMIT & PECHOTA, *supra* note 236, at 2075.1.

329. A major movement that facilitated the resolution of disputes in Latin American was the establishment of the Inter-American Commercial Arbitration Commission. JOHN T. VANCE & HELEN L. CLAGETT, A GUIDE TO THE LAW AND LEGAL LITERATURE OF MEXICO 101 (1945).

330. Alexander C. Hoagland, *Modification of Mexican Arbitration Law*, J. INT'L ARB., Mar. 1990, at 91.

331. Mexico ratified the convention effective June 1, 1973. Camp, Jr., *supra* note 223, at 723 n.18.

332. Mexico signed and ratified the convention in 1978. Camp, Jr., *supra* note 223, at 723 n.23.

333. Hoagland, *supra* note 330, at 92.

334. Unlike the United States, Mexico did not make a reservation to the New York Convention. 2A SMITH & PECHOTA, *supra* note 236, at 2075.2. Thus, Mexico would arguably enforce awards that did not deal solely with "commercial" matters. *Id.* See *supra* note 273 and accompanying text for discussion of the United States reservation to the New York Convention.

335. Hoagland, *supra* note 330, at 92. *See also* 2A SMIT & PECHOTA, *supra* note 236, at 2060 (stating that "treaties duly entered are part of the supreme law of Mexico and supersede conflicting provisions of domestic law").

336. The attorney general of Mexico, Jorge Carpizio, recently established a specific arbitration group. Solis, *supra* note 20, at A1. Additionally, Mexico's commercial code was reworked in an attempt to "streamline arbitration." *Id.*

337. Hoagland, *supra* note 330, at 93, 99. Additionally, it is noted that the reforms in the Mexican arbitration process will not "cover all business disputes." Solis, *supra*

within Mexico using such institutions, the facilities available are not as fully developed as elsewhere.[338] More significant than the seeming inexperience, Mexico still harbors a degree of hostility toward arbitration as a judicial method that has been "imposed upon them"; this hostility must be dispelled before arbitration in Mexico will be seen as a favorable alternative for a foreign businessperson.[339] Thus, if international commercial arbitration is used, it would be more appropriate to arbitrate elsewhere, and only look for enforcement of any potential award in Mexico.[340]

As discussed previously, the United States favors arbitration and has embraced its use in international trade. The Mexican businessman could look for favorable treatment in carrying out an arbitration agreement in the United States or having an award enforced therein. While the United States has felt it desirable to adopt an international approach to arbitration of trade disputes, this might not be the case for Mexico.[341] What one country views as an appropriate international policy related to international commercial arbitration might "differ enormously" from the policy adopted by another country.[342] In fact, the large differences in Mexican and American culture and history have naturally resulted in different legal systems in the two countries.[343] However, by merely acced-

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note 20, at A1.

338. Camp, Jr., *supra* note 223, at 731 n.56.

339. REDFERN & HUNTER, *supra* note 224, at 120.

340. *Contra* KARL-HEINZ BOCKSTIEGEL, ARBITRATION AND STATE ENTERPRISES 53 (1984) (indicating that, as a matter of deference and consideration, arbitration should be done in the developing country, Mexico in this instance).

341. This follows from the definition of international law:

> International law is not law in its usually defined sense . . . . It is merely a body of rules established in custom or by treaty by which the intercourse between civilized nations is governed . . . . Obedience to it is voluntary only and can not be enforced by a common sovereign power. Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations.

REPERTORY OF INTERNATIONAL ARBITRAL JURISPRUDENCE, VOLUME I 1794 - 1918 3 (Vincent Coussirat-Coustere & Pierre Michel Eisemann eds. 1989).

342. *International Commercial Arbitration and International Public Policy*, *supra* note 236, at 377.

343. JAMES E. HERGERT & JORGE CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM i (1978). *See also* Fitch, *supra* note 35, at 375 (Mexico and United States have "differing interests and a significant disparity in . . . needs"). *See generally* William Bridge, *A Different Legal System: Civil Law (Mexico) and Common Law (United States)*, DOING BUSINESS IN MEXICO: VOLUME 1 1-1 (Susan K. Lefler ed. 1987).

ing to the New York and Inter-American Conventions, Mexico has indicated a willingness to have private commercial disputes resolved by international standards embodied in the agreements, rather than standards adopted by its own government.[344] Mexico will most likely abide by the terms of the conventions in most circumstances.

Despite the potential misgivings of an American businessperson of doing business in Mexico, international commercial arbitration remains the most effective device when dealing with "countries where major trad ing is relatively recent, such as between . . . industrialized and developing economies."[345] In fact, given the dramatic differences between the United States and Mexico, arbitration is arguably the general rule in international business dealings between the two.[346]

1. Mexican Case Law

Corresponding to the trend in the United States, the Mexican judiciary has moved toward supporting arbitration.[347] In general, however, relatively little has been published in English about how the Mexican legal system operates.[348] While the Mexican judicial system keeps a record of decisions, it generally does not publish the decisions.[349] Yet, some decisions do exist that highlight how an arbitration proceeding might be han dled in Mexico.[350]

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344. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 43 (1982). In agreeing to the New York Convention and the Inter-American Convention, Mexico has bound itself by the principle of *pacta sunt servanda*. *Pacta sunt servanda* is the fundamental principle underlying treaties and provides that treaties are binding on the parties and must be performed by them in good faith. HARRIS, *supra* note 69, at 762. This principle is embodied in Article 26 of the Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

345. Holtzmann, *supra* note 244, at 128.

346. "[A]rbitration clauses are the almost universal practice in commercial contracts between parties from different social, economic, and legal systems, because arbitration is seen to be the best available bridge between those who approach contract disputes from divergent cultural perspectives." *Id.*

347. Fagan & Arreola, *supra* note 30, at 813.

348. HERGET & CAMIL, *supra* note 343, at i.

349. *Id.* at 77. "[T]here is no attempt to report in a systematic or comprehensive manner." *Id.* Because, under Mexico's civil law system "courts do not make law," a detailed system of reporting cases is not considered necessary. *Id.* For a discussion of how the Mexican system differs from the United States system in following case law precedent, see *supra* note 324 and accompanying text.

350. These are summarized or "extracted" decisions, however, lessening their value as research tool. HERGERT & CAMIL, *supra* note 343, at 77.

In *Presse Office v. Centro Editorial Hoy, S.A.*,[351] a French company (Presse) granted a Mexican company (Centro) an exclusive license to distribute a Spanish edition of a French magazine.[352] Both parties agreed that any controversy arising from the deal would be submitted to arbitration at the International Chamber of Commerce (ICC) in Paris, France.[353] A controversy did arise, the matter was submitted to the ICC, and a final award was rendered in favor of Presse.[354] Over the request of Centro for judicial relief to avoid payment of the award, the enforcement of the award in Mexico was authorized.[355]

In *Malden Hills, Inc. v. Hilaturas Lourdes, S.A.*,[356] a Mexican court again enforced an arbitration award against a Mexican company, Hilaturas.[357] Malden Hills, Inc., a Massachusetts corporation, had a written contract with Hilaturas for purchase of cotton.[358] Both had agreed that disputes would be resolved by arbitration.[359] Hilaturas did not supply cotton according to the terms of the contract, upon which Malden Hills filed an arbitration complaint, and was granted a final award for damages.[360] Again, over objections by the Mexican company, the Higher Court of Appeals in Mexico permitted the enforcement of the award.[361] Both decisions indicate that Mexico has been willing to recognize and enforce arbitration agreements and awards relating to international commercial disputes.

C. Challenges to Arbitration

As noted above, effective arbitration brings stability to international trade, thus facilitating such trade. However, the success of arbitration

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351. 4 Y.B. COM. ARB. 301 (1979) (extract of decision). *See also* DOING BUSINESS IN MEXICO: STATUTORY VOLUME F4-1 (1987)[hereinafter DOING BUSINESS]. The Yearbook of Commercial Arbitration, in which the extract was found, publishes a yearly report in English of different countries' court decisions on application of the New York Convention. REDFERN & HUNTER, *supra* note 224, at 46 n.84.

352. DOING BUSINESS, *supra* note 351, at F4-1.

353. *Id.*

354. *Id.* at F4-1 to F4-2.

355. *Id.* at F4-2.

356. 4 Y.B. COM. ARB. 302 (1979) (extract of decision). *See also* DOING BUSINESS, *supra* note 351, at F3-1.

357. DOING BUSINESS, *supra* note 351, at F3-1.

358. *Id.*

359. *Id.*

360. *Id.* at F3-1 to F3-2.

361. *Id.* at F3-2.

turns on its stability and depends on whether the respective governments involved deem the process worthy. If national governments do not give adequate assurance that the arbitration process will be respected, international commercial arbitration will be ineffective.

> [T]he success of the process [arbitration of commercial disputes] depends on the willingness of a state . . . to allow for neutral arbitration in the first place. At various stages in the arbitral process, a national judiciary can, and often does, impose its will or its own notions of "fairness" and "justice" on the parties and the process. This may occur at the outset when determining which issues, if any, are arbitrable, during the process itself when determining the correctness of certain procedures and the powers to be accorded to the arbitrators, and finally at the conclusion of the process when determining whether and/or to what extent the award will be enforced.[362]

The advent of the conventions referenced by NAFTA have not fully removed "the influence of separate national policies on the arbitral process."[363] However, the New York Convention and the Inter-American Convention are a step in the right direction in attempting a truly international approach which provides some distance from the "vagaries of different national legal systems."[364] Although these conventions place international obligations on member nations, their application in any particular instance will always be a "matter of national law and courts."[365]

Both the New York Convention and the Inter-American Convention list a defined set of exceptions under which an arbitral award could be refused from recognition and enforcement.[366] The exceptions can be broadly classified into two categories: (1) those which are requested by the defendant in the enforcement proceeding[367] and (2) those which the

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362. *International Commercial Arbitration and International Public Policy*, *supra* note 236, at 372-73. Arbitration can be hampered by national governments in that: "[N]ational policies may affect the arbitral process significantly in such fundamental areas as the matter that may be submitted to arbitration and the enforcement of the ultimate awards. In short, *nations do not and will not easily relinquish their influence in the resolution of disputes taking place on their territories.*" *Id.* (emphasis added).

363. *Id.* at 374.

364. *Id.* at 375.

365. REDFERN & HUNTER, *supra* note 224, at 7.

366. These exceptions are contained in Article V of the New York Convention and Article 5 of the Inter-American Convention. Both sources list the same seven instances in which recognition and enforcement might be precluded. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487-88 (1987).

367. This broad category includes five exceptions:

> (1) [I]ncapacity of the parties or invalidity of the arbitration agreement; (2) violation of due process; (3) an award outside the scope of the arbitration agreement; (4) irregularity in the composition of the arbitral tribunal or the arbitral procedure; and (5) an award not binding, set aside, or suspended.

1 SMIT & PECHOTA, *supra* note 236, at 28.

court considers on its own motion.[368] These exceptions are specifically defined and documented, and a businessperson well-versed in international trade would most likely be aware of their implications. This Comment will instead focus on those particular challenges that may be asserted when trade occurs between a private party and a state or state entity. As opposed to the seven defined exceptions of the New York and Inter-American Conventions, these defenses are not listed and the businessperson might not be aware of their use. The end result is that while conventions referenced by NAFTA add a degree of certainty to international trade, they do not answer "[t]he question of whether a state or its agency of instrumentality can successfully invoke a plea of state immunity."[369]

Unique challenges exist when proceeding under the rubric of a "state contract." A state contract are those contracts linking together a state or public authority with a foreign private person.[370] Such contracts are becoming increasingly prevalent as more states become involved in economic activities.[371] Any time a state enterprise[372] is involved, a question arises whether the state enterprise may claim an immunity.[373] In fact, this challenge is "frequently invoked" and by a number of different governmental entities.[374] By the very fact of being a sovereign nation, the

368. This includes two exceptions: "(1) the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where enforcement is sought; or (2) recognition or enforcement of the award would be contrary to the public policy of that country." *Id.* at 29.

369. 1 SMIT & PECHIOTA, *supra* note 236, at 25. For a full discussion of sovereign immunity, see *infra* notes 381-99 and accompanying text.

370. Abbott, *supra* note 100.

371. Centre for Studies and Research in International Law and International Relations, TRANSNATIONAL ARBITRATION AND STATE CONTRACTS 84 (1987). In the formation of GATT, this was noted to be a problem because of "differing conceptions of the proper role of government in the economy." Abbott, *supra* note 100.

372. NAFTA defines a state enterprise as "an enterprise that is owned, or controlled through ownership interests, by a Party." NAFTA, *supra* note 11, art. 201.

373. BOCKSTIEGEL, *supra* note 340, at 39. Three issues impact the determination of whether an immunity exists. First, does the state enterprise have a separate legal existence apart from the state. Second, if so, is it a public entity or entity functioning in a private capacity. Finally, and most importantly, does the dispute involve commercial activities. This last fact is of paramount import because, in the "majority of international contracts and arbitration disputes with states and state enterprises," such a finding of commercial activity will preclude an immunity defense. *Id.*; *see infra* notes 382-84, 393, and accompanying text.

374. MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW 119 (1990).

state has some "prerogatives" unavailable to the individual businessperson, which can often result in "one-sided consequences."[375]

Many commentators have highlighted the instances in which enforcement of an arbitration award against a state enterprise or state was precluded.[376] Even if the award will ultimately be granted, in dealing with states and state enterprises, it "may be more difficult in fulfilling the arbitration awards."[377] Most significantly, the private party cannot resort to international law for support.[378]

Succinctly stated, a private party can not fully rely on equity while en gaging in a business deal with a foreign government. In fact, the most significant cause of "uncertainty" in the international trading realm results from the "self-serving actions of self-interested nation-states."[379] By refusing to recognize or enforce an arbitration agreement or award, the foreign government "can deprive the arbitration of any practical importance."[380] Therefore, assertion of the sovereign immunity defense lessens or removes any benefits originally accruing to international arbitration.

1. Immunity of States and State Entities

Generally, the immunity of states from the jurisdiction of the courts of another state is an "undisputed principle of customary international law."[381] This principle had no exceptions until the twentieth century.[382] However, in the early 1950s, the United States adopted, by practice, an exception to such immunity when a state party was engaged in commer-

375. SURVEY OF INTERNATIONAL ARBITRATIONS, *supra* note 305, at viii.

376. *Id.* at 49.

377. *Id.* In general, an arbitration award will be slower in coming when dealing with a state enterprise. *Id.* This could be due to the time-consuming decision-making process within a state enterprise, the need to obtain authorization from the state before fulfilling the award, or an active intent to delay or avoid the award due to a lack of funds either by the enterprise or the state. *Id.*

378. "A dispute between a State and a foreigner is, in general, not in the domain of international law." SURVEY OF INTERNATIONAL ARBITRATIONS, *supra* note 305, at vii.

379. WINHAM, *supra* note 34, at 21.

380. Danilowicz, *supra* note 222, at 237.

381. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § IV, ch. 5, subch. A (1987). *See, e.g.*, Berrizzi Bros. v. The Pesaro, 271 U.S. 562 (1926); The Schooner Exch. v. McFaddon, 11 U.S. 116 (1812).

382. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § IV, ch. 5, subch. A (1987). As states became increasingly more engaged in commercial activities, such an absolute immunity was thought undesirable. *Id.* It deprived the private party of judicial remedies and secured an unfair competitive advantage to the state in engaging in such commercial activities. *Id.*

cial activities.[383] This practice was administered by the State Department.[384]

This principle of removing sovereign immunity when the sovereign was engaged in commercial activities had been recognized long ago.[385] The fact that a state is party to a deal does not automatically remove the commercial nature of the transaction.[386] Yet, the mere fact that a state is involved in the transaction makes it easier for the state to argue that the deal is not commercial in nature.[387]

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383. *Id.* In 1952, the State Department removed the absolute immunity to jurisdiction with publication of a Department of State Bulletin authored by Jack B. Tate, the Acting Legal Adviser to the Department of State. *Id.* Thereafter, United States courts adopted this approach as well. *Id. See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 69 (1965). What constitutes "commercial activity" thus become important. The United Nations, in promoting the Model Law on International Commercial Arbitration indicates that a commercial activity should be defined as broadly as follows:

> The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation of or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 1 n.2 (U.N. Comm'n on Int'l Trade Law 1985). This model was adopted by the United Nations Commission on International Trade on June 21, 1985. *Id.*

384. After the Tate pronouncement, decisions on sovereign immunity were funnelled through the State Department. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 69 reporter's note 1 (1965). As such, concerns of foreign policy were weighed in the equation, resulting in a granting of immunity when a strict interpretation of the new doctrine would not call for it. *See, e.g.*, Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961). This policy of funneling the issue through political channels resulted in a "pervasive absence of consistency and clarity in the application of sovereign immunity." Thomas M. DiBiagio, *Federal Jurisdiction over Foreign Governments for Violations of International Law: Foreign Sovereign Immunity and the Alien Tort Statute After* Amerada Hess Shipping Corp. v. Argentine Republic, 12 MD. J. INT'L L. & TRADE 153, 158 (1988).

385. "If a monarch establishes a mercantile business in a foreign country, he carries no exemption from the law of the land along with him, but is simply subject to the general laws of the land." REPERTORY OF INTERNATIONAL ARBITRAL JURISPRUDENCE, *supra* note 341, at 134.

386. "That a government is a party to a transaction does not destroy its commercial character." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 cmt. f. (1987).

387. GERALD AKSEN & ROBERT B. VON MEHREN, INTERNATIONAL ARBITRATION BETWEEN

a. Foreign Sovereign Immunities Act (FSIA)[388]

The bill establishing the FSIA, H.R. 11315, was proposed to determine how an action should be maintained against a foreign state.[389] Given the increasing frequency with which states were becoming involved in commercial business, the bill was deemed "urgently needed."[390] The claim of sovereign immunity by the foreign state invoked "considerable uncertainty" on the part of the private litigant, who could not be assured that the issue presented would be decided on the merits or "on the basis of nonlegal considerations through the foreign government's intercession."[391]

The FSIA removed the examination of a claim of sovereign immunity from the State Department and placed it in the United States judicial system.[392] Pursuant to the FSIA, "[S]tates are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned."[393] Foreign states include any political subdivision or "agency or instrumentality of a foreign state."[394] The FSIA removes immunity for commercial acts arising under three scenarios.[395] Furthermore, commercial activity embodies "either a regular course of commercial conduct or a particular commercial transaction or act."[396] Courts of a significant number of countries have chosen to embrace a wide range of business transactions under this definition.[397] As this definition implies, it is the underlying nature of the business deal that must be examined, and not,

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PRIVATE PARTIES AND GOVERNMENTS 98 (1983). This argument is supported by the assertion that any contract to which a State is party involves a public act of "fundamental national interest." *Id.* This assertion has considerable force in contracts with third-world states, such as Mexico. *Id.*

388. 28 U.S.C. §§ 1602-11 (1988 & Supp. 1992).

389. H.R. 11315, 94th Cong., 2d Sess. 6-7 (1976). During discussions related to the bill, an increasing frequency of contacts between United States citizens and "foreign states and entities owned by foreign states" was noted. *Id.*

390. *Id.*

391. *Id.*

392. "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the states in conformity with the principles set forth in this Chapter." FSIA, *supra* note 388, at sect. 1602. *See also* New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 502 F. Supp. 120, 124 (S.D.N.Y. 1980).

393. 28 U.S.C § 1602 (1988).

394. 28 U.S.C. § 1603(a) (1988).

395. The scenarios are as follows: (1) commercial activity carried on in the United States by the foreign state, (2) an act occurring in the United States that is connected to commercial activity of the foreign state elsewhere, or (3) an act occurring outside the United States in connection with foreign commercial activity that has a direct effect within the United States. 28 U.S.C. § 1605(a)(2) (1988).

396. 28 U.S.C. § 1603(d) (1988).

397. REDFERN & HUNTER, *supra* note 224, at 15.

for example, the ultimate use of the goods purchased.[398] A wide range of activities would be encompassed by this definition.[399]

b. Act of State doctrine

Separate and apart from a claim of sovereign immunity lies the Act of State doctrine. This doctrine was developed in *Underhill v. Hernandez*,[400] in which the Supreme Court stated: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within is own territory."[401] This doctrine exists apart from that of sovereign immunity and the FSIA was not meant to deal with such a claim.[402] Under this doctrine, courts in the United States will not examine foreign state actions that are purely public, noncommercial actions in nature.[403] States often invoke both the sovereignty defense as well as the Act of State doctrine,[404] and courts often consider the two together.[405] Most significant, the Act of State

398. H.R. 11315, 94th Cong. 2d Sess. 16 (1976). For example, the fact that the purchase of goods will ultimately be used for some public purpose does not lessen the commercial nature of the transaction. *Id.* "Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes commercial activity." *Id.* The FSIA provides: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C § 1603(d) (1988).

399. "Activities such as a foreign government's sale of a service or product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation" would all fall within such definition. H.R. 11315, 94th Cong., 2d Sess. 16 (1976).

400. 168 U.S. 250 (1897).

401. *Id.* at 252.

402. In many instances after a sovereign immunity claims has been rejected, the state will then assert an act of state claim. H.R. 11315, 94th Cong., 2d Sess. 20 n.1 (1976).

403. "[C]ourts in the United States will generally refrain from examining the validity of a taking by a foreign state or property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 (1987).

404. *See, e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

405. However, while many courts discuss the two "interchangeably," they are fundamentally different. Steven R. Ratner, *International Tin Council v. Amalgamet Inc.*

doctrine provides another potential defense for states or state entities involved in international commercial dealings.

2. Challenges to Arbitration and Mexico

United States caselaw provides some guidance and discussion of the issues that arise when maintaining an action against Mexico or one of its numerous state instrumentalities.[406] In *Sugarman v. Aeromexico*,[407] the Third Circuit had to determine whether Aeromexico, the national airline of Mexico, could properly assert a claim of sovereign immunity.[408] In this case, Sugarman, a United States citizen claimed negligence on the part of Aeromexico in having to wait 15 hours for a flight that was to depart from Mexico to New York City.[409] The court concluded that the activities of Aeromexico constituted "commercial activities" under the FSIA and thus removed Aeromexico's immunity.[410] The court noted that

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524 N.Y.S. 2d 971, 82 AM. J. INT'L L. 837, 839 (1988). Sovereign immunity relies on international law and is a jurisdictional defense; the Act of State doctrine rests on principles of U.S. constitutional law and comity and is an affirmative defense. *Id.* The Act of State doctrine attempts to "avoid disrespect for foreign states." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 cmt. a. (1987). "To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations." Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918). However, in *Alfred Dunhill Inc.*, the Court did bring the two closer together by suggesting an exception to the act of state doctrine when the foreign state is involved in a purely commercial act. *Alfred Dunhill Inc.*, 425 U.S. at 695-706. This would be analogous to the commercial act exception under the FSIA. *See supra* note 393 and accompanying text.

406. *See* Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 530 (5th Cir.) (suit against Petroleos Mexicanos, PEMEX, the national oil company of Mexico), *cert. denied*, 113 S. Ct. 413 (1992); Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (PEMEX), 767 F.2d 1140, 1143 (5th Cir. 1985) (suit against PEMEX and others); Rapoport v. Banco Mexicano Somex, S.A., 668 F.2d 667, 669 (2d Cir. 1982) (suit against nationalized bank of Mexico); Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1269 (9th Cir. 1981) (suit against shipyard owned and operated by Republic of Mexico); Sugarman v. Aeromexico, Inc., 626 F.2d 270, 270 (3d Cir. 1980) (suit against Aeromexico, the "national airline of Mexico"); Southern Seas Navigation Ltd. v. Petroleos Mexicanos of Mexico City, 606 F. Supp. 692, 692 (S.D.N.Y. 1985) (suit against PEMEX).

407. 626 F.2d 270 (3d Cir. 1980).

408. *Sugarman*, 626 F.2d at 271. Other cases involving state entities have also involved claims of sovereign immunity. *See, e.g., Rapoport*, 668 F.2d at 668; *Insurance Co. of N. Am.*, 649 F.2d at 1269, 1272 (claim of sovereign immunity, though not decided in the case).

409. *Sugarman*, 626 F.2d at 273, 273 n.5. Plaintiff further claimed suffering "cardiac insufficiency, angina, and arrhythmia" as well as various other physical and mental anguish. *Id.* at 271.

410. *Id.* at 272.

the operation of an airline entails a "regular course of commercial conduct" and as the flight was returning to the United States, such activity constituted activity within the United States.[411] Most significant, the court concluded its interpretation of the FSIA coincided with legislative history, and its decision supported the goals of the FSIA.[412]

Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co., (PEMEX)[413] involved the validity of arbitration clauses in international transactions as well as claims of sovereign immunity.[414] Sedco, Inc. owned a drilling vessel operating in the Gulf of Mexico under charter to Perforaciones Marinas del Golfo, S.A. (Permargo); Permargo was under contract to drill oil wells for PEMEX, the national oil company of Mexico.[415] A "massive blowout" occurred on June 3, 1979, causing one of the worst oil spills in history.[416] Sedco, Inc. defended itself by asserting an indemnity clause that stated Permargo would assume all responsibility for such occurrences.[417] However, Permargo refused to defend Sedco, upon which Sedco filed suit against Permargo and PEMEX.[418] PEMEX was dismissed based on a claim of sovereign immunity.[419]

The claim was then solely between Sedco and Permargo and resolution of the dispute was based upon the interpretation of the charter agreement signed between the two.[420] In the charter agreement, the parties had stipulated that any dispute arising would be submitted to arbitration in New York.[421] The court noted that Sedco was a Texas compa-

411. *Id.* at 272, 272 n.4, 273.

412. *Id.* at 273-74. The court noted that the "Tate letter" signaled a significant change in the United States position on sovereign immunity. *Id.* at 273. The court, citing the Tate letter with approval, noted that the removal of immunity for commercial acts was made "necessary [as] a practice which will enable persons doing business with them [states] to have their rights determined in the courts." *Id.* at 274.

413. 767 F.2d 1140 (5th Cir. 1985).

414. *Id.* at 1142-46.

415. *Id.* at 1143.

416. *Id.* The damages were contained in March of 1980 when the oil well was finally capped. *Id.* at 1143 n.6.

417. *Id.* at 1143-44. The indemnity clause in part stated that Permargo would "assume all responsibility for . . . and to protect, and indemnify and hold harmless the owner [Sedco] . . . from loss or damage arising from pollution or contamination, regardless of cause and without regard to the negligence of any party." *Id.* at 1143-44.

418. *Id.* at 1144.

419. *Id.*

420. *Id.*

421. *Id.*

ny, and Permargo was a Mexican company; the two countries represented were both signatories of the New York Convention.[422] The court held that the dispute should properly be compelled to go to arbitration as the arbitration agreement fell "squarely" within the terms of the New York Convention.[423]

Most significantly, the court posited some general guidelines as to arbitration agreements and their interpretation. First, the court noted that when an arbitration agreement is present, there is a presumption that arbitration should proceed unless strong evidence indicates the dispute was not imagined to be covered by the clause or agreement.[424] The court further asserted that as a "general rule" if an arbitration clause is at issue, "the court should construe the clause in favor of arbitration."[425]

Arriba Ltd. v. Petroleos Mexicanos[426] presents the two basic challenges to jurisdiction, foreign sovereign immunity[427] and the Act of State doctrine.[428] Arriba, a Bahamian corporation with its principal place of business in the United States filed suit for a failed contract against Pemex, the nationalized oil company of Mexico.[429] The dispute arose out of a single transaction negotiated in 1984 by Bill Flanigan, later Arriba's president, by which Pemex was to sell Arriba a minimum of 6 million barrels of Pemex's residual oil.[430] Never having received any oil, Arriba sued and obtained a $92 million default judgment in June 1985 in a Texas state court, followed by a subsequent $273 million default judgment plus punitive damages.[431] Still without satisfaction, Arriba brought yet another action in a federal district court in May of 1990.[432]

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422. *Id.* See *supra* notes 269-88 and accompanying text for a discussion of the New York Convention.

423. *Sedco, Inc.*, 767 F.2d at 1150. In arriving at this holding, the court looked to the "tone of the [arbitration] clause as a whole." *Id.* at 1145 n.10. The court noted that if "broadly" written, most disputes should be handled by an arbitration agreement. *Id.*

424. *Id.* at 1145.

425. *Id.*

426. 962 F.2d 528 (5th Cir.), *cert. denied*, 113 S. Ct. 413 (1992).

427. This remains the "principal obstacle" to enforcement of arbitration. AKSEN & MEHREN, *supra* note 386, at 46-47.

428. Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 528. Though raising both issues, the case only examined the foreign sovereign immunity claim as the Act of State claim became moot by the decision. *Id.* at 528 n.1.

429. *Id.* at 530. Pemex was "relative newcomer" to the litigation, having been sued for the first time in 1990. *Id.*

430. *Id.*

431. *Id.* at 530-32.

432. *Id.* at 532.

The Fifth Circuit Court of Appeals began by noting the Foreign Sovereign Immunities Act (FSIA)[433] sets forth the "sole and exclusive standards" by which to resolve sovereign immunity issues in federal and state courts.[434] The court then proceeded to note various exceptions to FSIA, invoking the major exception of "commercial activity."[435] The court noted that "great latitude" is afforded when determining what constitutes "commercial activity."[436]

When proceeding under the FISA, the plaintiff bears the burden of proving the defendant is an agent of the sovereign.[437] The court in *Arriba Ltd.* found Arriba's claim deficient in this respect, as Arriba failed to show any actions by Pemex which indicated that Pemex had acted as a principal in the deal.[438] The court had previously established Pemex as an undisputed "foreign government instrumentality,"[439] but found that Arriba failed to show that Pemex was a party to the original agreement.[440] The court finally rested its conclusion on "judicial comity," noting that it is necessary in an increasingly global economy, and that allowing such charges to proceed in American courts "could seriously impede our relations with Mexico."[441] Thus, applying the FSIA, the court held that there was no jurisdiction over the defendant.[442] In this instance, Pemex's assertion of sovereign immunity precluded an American businessman from obtaining redress.

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433. *See supra* note 388-89 and accompanying text.

434. *Arriba Ltd.*, 962 F.2d at 532.

435. *Id.* at 533.

436. *Id.* However, the court also noted there must be a material connection between the cause of action and the commercial acts of the sovereign, thus precluding actions on isolated or unrelated commercial actions by a foreign sovereign. *Id.* This limiting language seems to go against the "wide interpretation" favored by the UNICTRAL Model Law. *See supra* note 383 and accompanying text. This Model Law has considerable weight as the United Nations General Assembly, by resolution, urged "all States to give due consideration" to the Model Law. Brand, *supra* note 288.

437. *See, e.g.*, Foremost-McKesson, Inc. v. The Islamic Republic of Iran, 905 F.2d 438, 447 (D.C.Cir. 1990); Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 176 (5th Cir. 1989). In *Arriba Ltd.*, the Court of Appeals noted the District Court had improperly place such burden on the defendant, that is to prove it was not an agent of the sovereign. *Arriba Ltd.*, 962 F.2d at 534 n.8.

438. *Arriba Ltd.*, 962 F.2d at 536.

439. *Id.* at 533.

440. *Id.* at 536.

441. *Id.* at 537.

442. *Id.* at 539.

The problem of state immunity would appear limited as it occurs "only in such cases of commercial arbitration where one of the parties is a State or State-owned enterprise engaged in commercial activities."[443] Yet, even when only asserted in limited circumstances, the consequences are dramatic to the private party.[444] The fact that inequality exists between the participants gives rise to "legal complications" not obvious to the unwary.[445] A defense of State immunity can counter a valid arbitration clause.[446] In fact, a party cannot rest solely on an arbitration clause in the long term because the only instance in which a foreign state will refrain advancing the sovereign immunity defense is when the defense "ruins [the state's] credit, thus losing more than it can reasonably hope to win by going back on its word."[447] However, this is little consolation to a private party who must then try to determine whether the government will keep its word or find it more beneficial to invoke a sovereign immunity defense.

Mexico has a long history of intensive government intervention in business affairs.[448] In fact, "many legal entities which are private corporations in the United States are federal governmental bodies in Mexico."[449] Mexico has chosen to protect its "strategic industries" by keeping the petroleum sector, electricity, and railroads under government control.[450] The Mexican government has ties to various other industries as well.[451]

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443. Ignaz Seidl-Hohenveldern, *Commercial Arbitration and State Immunity*, *in* INTERNATIONAL TRADE ARBITRATION: A ROAD TO WORLD-WIDE COOPERATION 87, 87 (Martin Domke ed., 1958).

444. Although a State may be inclined to arbitrate a dispute with another State, when a state deals with a private party, the State is no longer dealing with an "equal" and may be more inclined to "entrench" itself behind a defense of sovereignty. TRANSNATIONAL ARBITRATION AND STATE CONTRACTS, *supra* note 371, at 81.

445. SURVEY OF INTERNATIONAL ARBITRATIONS, *supra* note 305, at xii.

446. TRANSNATIONAL ARBITRATION AND STATE CONTRACTS, *supra* note 371, at 92. "In all cases" in which a State contracts with a private person, there exists the risk that the State might attempt to utilize a defense of sovereign immunity. *Id.* at 87. *See also* SURVEY OF INTERNATIONAL ARBITRATIONS, *supra* note 305, at xiii. Some commentators believe the defense has been vastly over-utilized and argue for the elimination or significant reduction of the defense. BOCKSTIEGEL, *supra* note 339, at 53.

447. TRANSNATIONAL ARBITRATION AND STATE CONTRACTS, *supra* note 371.

448. HERGERT & CAMIL, *supra* note 343, at 65. The nationalization of the petroleum industry in 1938 stands as a major "milestone" in this process of government intervention. *Id.*

449. *Id.* at 72. This can cover "railroads, electric power, airlines, gasoline, [and] hospitals." *Id.*

450. *See generally Mexico Should Privatize or Liberalize Strategic Industries, Mexican Scholar Says*, BNA INT'L BUS. DAILY, Mar. 16, 1992. These industries are protected by the Mexican Constitution. *Id. Accord* Reynolds, *supra* note 178.

451. Juanita Darling, *Mexico to Quit Fund that Goes After U.S. Firms*, L.A. TIMES, Feb. 18, 1993, at D3. A bank controlled by the Mexican government held a 25% share of an investment fund that openly planned to buy U.S. companies and move their op-

The Mexican government has attempted to move out of some of these industries, but as yet is still involved to a high degree in many industries.[452] A privatization effort to remove the Mexican government from various industries began in early 1982 under the de la Madrid administration.[453] As part of President Salinas' current market reform efforts, Mexico has attempted to privatize a number of businesses,[454] but progress has been slow and a large number of government controlled businesses still exist.[455] Furthermore, privatization of industries does not always prove to promote efficient operation.[456] In addition, the changes often move slowly given the large number of parties involved.[457] In negotiating NAFTA, Congress believed such issues were properly handled by the Mexican government and that such concerns had "no place in trade negotiations."[458] However, as this belief is disproven, the concern contin-

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erations into Mexico. *Id.* The fund, the AmeriMex Maquiladora Fund Limited Partnership, planned to then resell the relocated companies after bolstering profits by lowering wage costs. *Id.* The Mexican government withdrew from participation after a vocal protest to such practice ensued in the Congress. *Id.* However, this is indicative of how active the government is in economic participation as they were willing to participate in such a fund even though such an arrangement might have put the North American Free Trade Agreement in jeopardy. *See id.*

452. Siquerios, *supra* note 10, at 295. Until 1990, the Mexican government was involved in the telephone industry, Telefonos de Mexico, S.A., the steel sector, Sidermex, S.A., and mining concerns, Capania Minera de Cananea, S.A., to name a few. *Id.*

453. Rubio, *supra* note 192, at 237 n.5.

454. Interestingly, this move to sell off state-owned businesses has made "winners" of U.S. investors. Dentzer, *supra* note 173. United States investors can obtain good deals by "purchas[ing] formerly state-owned companies" in Mexico. *Id.*

455. As of February 1992, the Mexican government had only privatized some 921 of the 1,115 state-owned companies. Espana, *supra* note 17. The move to privatize businesses resulted from an understanding that state money was being "soaked up by the constant losses of state-owned enterprises." Naim, *supra* note 39. These losses were due to the general understanding that "state support for industry promotes inefficiency." CRISPO, *supra* note 35, at 98.

456. For example, the "NAFTA-encouraged" effort to privatize resulted in the private ownership of toll roads in Mexico. Jones, *supra* note 191. In one result, the Mexico City - Acapulco toll increased to a burdensome $80 for a six-hour trip. *Id.*

457. "The public bureaucracy, Congress, the courts, state and local governments, political parties, labor unions, private sector organizations, and other interest groups all get involved in the process." Naim, *supra* note 39. The "technical nature" of such changes also adds to the delay. *Id.*

458. TRADE AND INVESTMENT LIBERALIZATION MEASURES, *supra* note 53.

ues that the Mexican government is in businesses and areas "where it does not belong."[459]

There also exists an element of fear of "economic imperialism" throughout the hemisphere.[460] This wariness has "plagued the resolution of disputes arising in inter-American commercial transactions."[461] Other Western countries have been hesitant to adopt American legal precepts, some arguing that to do so would amount to "ethnocentric cultural imperialism."[462] There is a general feeling that the United States does not sufficiently appreciate or understand the Mexican culture or society.[463] This is extremely significant as a primary reason for conflict in international trade is a lack of understanding about "the nations, cultures and individuals with which we deal."[464]

Some Mexican opponents of NAFTA have argued that the major thrust of NAFTA, to increase trade among Mexico and the United States is merely the "latest attempt to exercise political hegemony over Mexico."[465] Some in Mexico fear increased trade will result in an intrusion on Mexico's sovereignty.[466] In light of all these facts, an American businessperson must not rush headlong into a business deal in Mexico, but must instead consider and weigh all the benefits and risks associated with such trade.

VI. RECOMMENDATIONS

A. *Private Parties Should Proceed With a Degree of Caution*

A common feature of international commercial contracts is the "ever-

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459. DOING BUSINESS IN MEXICO, *supra* note 15, at 8.

460. *The Resurgence of Democracy in Latin America*, *supra* note 210. In light of this fact, nations naturally attempt to protect their sovereignty. *Id.* A necessary aspect of sovereignty is the states "ability to devise policies, laws, and regulations affecting foreign trade and investment." *Id.*

461. H.R. REP. NO. 501, 101st Cong., 2d Sess. 4 (1990). In fact, a large measure of why the United States become party to the Inter-American Convention was the previous rejection of joining international conventions by the Latin American countries. *Id.* The United States felt that joining a regional agreement might lessen the trepidation. *Id.*

462. *See generally* Michael Ross Fowler & Julie M. Bunck, *Legal Imperialism or Disinterested Assistance? American Legal Aid in the Caribbean Basin*, 55 ALB. L. REV. 815 (1992).

463. *See generally* Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391 (1993).

464. Dress, *supra* note 312, at 571.

465. Fitch, *supra* note 35, at 377.

466. *Id.* at 377-78.

growing number of instances" where problems threaten contract performance.[467] Disputes frequently involve a state or state entity and a private party.[468] Various sources exist describing how arbitration can lessen or remove such problems or disputes.[469] Yet, even when drafting a well-crafted arbitration clause or agreement, the private businessperson must always remember the social, political, and historical differences that have highlighted the United States-Mexican relation.[470] These differences make trade disputes and tension almost "inevitable."[471] Thus, the American businessman should cultivate an "awareness" of the Mexican culture and system if expecting to operate successfully.[472]

1. International Commercial Arbitration not a Panacea

Historically, Latin American countries generally disfavor arbitration.[473] The benefits of international commercial arbitration are well-known in the Western industrialized world and thought to be desirable in most instances.[474] The acceptance of international commercial arbitration as the means of dispute settlement in developing countries, such as Mexico, was seen to rest merely on "educating the governments and business and legal circles" to the advantages of arbitration.[475] In many respects, developing countries have accepted the suitability of arbitration for general

467. INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO ARBITRATION 18 (1983).

468. REDFERN & HUNTER, *supra* note 224, at v.

469. For example, the Guide to Arbitration presents, in different languages, the ways by which a party can make use of the International Chamber of Commerce arbitration process. GUIDE TO ARBITRATION, *supra* note 467, at 9. The Guide provides the wording necessary to allow for intervention by a third party. *Id.*; *see also* Jean Heilman Grier, *Providing For Dispute Settlement in* INTERNATIONAL BUSINESS TRANSACTIONS 775 (PLI Litig. & Practice Course Handbook Series No. 789, 1992).

470. Anderson & Grossman, *supra* note 323, at 191 (noting "a history of conflict between north and south, widely varying intellectual and cultural traditions, and numerous differences").

471. Fitch, *supra* note 35, at 354 n.8 (citing SIDNEY WEINTRAUB, A MARRIAGE OF CONVENIENCE: RELATIONS BETWEEN MEXICO AND THE UNITED STATES 69-72 (1990)).

472. *See generally* John M. Bruton, *A Different Culture: Cultural Considerations in Doing Business in Mexico*, DOING BUSINESS IN MEXICO: VOLUME 1 2-1 (Susan K. Lefler 1987).

473. TRANSNATIONAL ARBITRATION AND STATE CONTRACTS, *supra* note 369, at 81. *See also* REDFERN & HUNTER, *supra* note 224, at 6 (region traditionally "hostile to commercial arbitration").

474. RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 284-85 (Thomas E. Carbonneau ed. 1984).

475. *Id.* at 285-86.

commercial transactions yet remain reluctant to apply arbitration in situations involving important government objectives.[476] However, there still remains a general movement toward using arbitration in Mexico, especially among "Mexican entrepreneurs" who are open to the benefits of international trade.[477]

The most important requirement is to establish an agreement by the parties that the dispute will be handled by arbitration, and this remains the "foundation stone of modern international commercial arbitration."[478] This agreement establishes that the parties have consented to the arbitration process.[479] Consent is critical, because without it, "there can be no valid arbitration."[480]

The best means to provide for arbitration is to draft an arbitration agreement or clause.[481] Two general objectives should be sought: (1) to draft the arbitration agreement or clause to handle the particular needs of the situation and (2) the clause or agreement must be clear and unambiguous.[482] The drafting parties should attempt to make their understanding clear, as an arbitrator generally will respect their intentions.[483]

Of particular concern is the proper drafting of an effective arbitration clause or agreement. The drafting must be done with particular specificity as it presents a "trap for the unwary."[484] Giving adequate consideration and time to the arbitration clause or agreement is critical. This is especially true since the arbitration clause or agreement is seldom a key element of the business deal and many times becomes the "last item discussed" before finalization of the deal.[485] While an agreement to arbitrate can be embodied in a distinct and separate instrument from the business contract, the insertion of a well-drafted arbitration clause in the business contract will suffice.

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476. *Id.* at 286.

477. 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION: Mexico-3 (Albert Jan Van Den Berg ed. 1984).

478. REDFERN & HUNTER, *supra* note 224, at 3.

479. *Id.* at 4.

480. *Id.*

481. Camp, Jr., *supra* note 223, at 734.

482. *Id.*

483. 2A SMIT & PECHOTA, *supra* note 236, at 2833.

484. Fagan & Arreola, *supra* note 30, at 818. The person drafting an international business deal should not become overly consumed by the details of the deal and forget the arbitration clause. "There is an astonishing contrast between the degree of sophistication reflected in the substance of some voluminous international contracts, prepared by highly competent and resourceful personnel, and the primitiveness of the error to be found in the arbitration clause." *Id.* 818-19 (quoting W. LAWRENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCIAL ARBITRATION 160 (1990)).

485. Robert Coulson, *Survey of International Commercial Arbitration Procedures*, *in* INTERNATIONAL ARBITRATION KIT 159, 159 (1981).

a. Arbitration clause[486]

In all international business contracts, arbitration clauses can be designed to reduce risk.[487] Most importantly, they are useful in reducing uncertainty, the factor that the businessperson fears "above almost all other risks of doing business."[488] It is now common practice to insert arbitration clauses in most any kind of international transaction.[489] The arbitration clause, if properly drafted, can have application to a variety of situations.[490] As the "essential prerequisite" to arbitration, the arbitration clause must specify an agreement to arbitrate.[491] If done properly, all the benefits of international arbitration are available to the businessperson.[492]

b. Arbitration clause when dealing with a state or state entity

Specific reasons exist for using an arbitration clause when operating under a state contract.[493] Private parties harbor uncertainty about being subject to the co-contracting state's jurisdiction. The contracting state is generally not amenable to suit in another state's jurisdiction.[494] In many developing countries, where the government is actively involved in the economy, international arbitration stands as the preferred method of dis pute resolution.[495] Contracts between private parties and state entities "almost invariably" use an arbitration clause.[496] The arbitration clause

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486. "A clause inserted in a contract providing for compulsory arbitration in case of dispute as to rights or liabilities under such contract . . . . The purpose of such clause is to avoid having to litigate disputes that might arise." BLACK'S LAW DICTIONARY 105 (6th ed. 1990). An arbitration clause is known as "clausula compromisoria" in Mexico. Siquerios, *supra* note 10, at 321.

487. The mere use of a dispute resolution clause often can "de-escalate tensions" when a deal has fallen apart. Dress, *supra* note 312, at 571.

488. Camp, Jr., *supra* note 223, at 725.

489. For example, "transnational contracts for the sale of goods, licensing or transfer of technology, loans of funds, and joint investment of capital" often contain arbitration clauses. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 reporter's Note 1 (1987).

490. Camp, Jr., *supra* note 223, at 739-51.

491. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 cmt. d. (1987).

492. Danilowicz, *supra* note 222, at 237.

493. TRANSNATIONAL ARBITRATION AND STATE CONTRACTS, *supra* note 369, at 80.

494. *Id.* Insertion of an arbitration clause shows the will to "internationalize" the contract, removing it from the jurisdictions of the contracting parties. *Id.*

495. AKSEN & MEHREN, *supra* note 387, at 17.

496. *Id.*

finds regular use in such cases.[497] The arbitration clause remains a key tool in obtaining a degree of certainty in dealing with a state or state en tity because attempts made by States to avoid the consequences of arbitration clauses are not well received by arbitrators.[498]

The use of an arbitration clause may preclude assertion of the sovereignty defense or Act of State doctrine. As a general proposition of international law, a state may waive its sovereign immunity either expressly or by implication.[499] Under United States law[500] and as an emerging principle of international law, an agreement to arbitrate acts as a waiver to sovereign immunity.[501] Generally, as opposed to the sovereignty defense, the Act of State doctrine can not be waived.[502] However, a valid arbitration clause will indicate the state party has acknowledged it is operating in the "international arena" and subject to international norms. Thus, justification for application of the Act of State doctrine is lessened.[503] To provide additional support to this argument, the private party should specifically request a waiver of immunity by the State or State entity.[504] Specific wording requesting such a waiver can be included in the business contract.[505]

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497. The arbitration of disputes is used often in "contracts with state-owned entities, whether in market, centrally-planned, or developing economies . . . ." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 reporter's note 1 (1987).

498. *Id.*

499. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 456(1) (1987).

500. Various cases hold that an agreement to arbitrate acts as a waiver of sovereign immunity. *See, e.g.*, Maritime Int'l Nominees v. Republic of Guinea, 505 F. Supp. 141, 143 (D.D.C. 1981); Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175, 1178 (D.D.C. 1980); Ipitrade Int'l v. Federal Republic of Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978). This principle is also codified in the FSIA: "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1) (1988). See *supra* notes 388-99 and accompanying text for discussion of FSIA.

501. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 456 reporter's note 3. (1987); Gary B. Sullivan, *Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits*, 18 TEX. INT'L L.J. 329 (1983).

502. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 cmt. e. (1987). The Act of State doctrine rests on "judicial self-restraint," and as such can not be waived by a foreign state. *Id.*

503. *Id.*

504. AKSEN & MEHREN, *supra* note 387, at 351.

505. Such language may read as follows:

> The government agrees that this arbitration clause is an explicit waiver of immunity against enforcement and execution of the Award or any judgment thereon and that the Award or judgement thereon, if unsatisfied, shall be enforceable against the government in the courts of any nation in accordance with its laws.

Id. at 357. *See also* Beverly May Carl, *Suing Foreign Governments in United States*

c. Drafting properly

To perform effectively, an arbitration clause must be well drafted. To do so, the clause must be drafted to specifically speak to the four different persons involved in the arbitration process:

> It must speak first to the parties who are negotiating the contract the clause will govern, then to the arbitrators who will resolve disputes under the authority of that clause. While an arbitration is taking place, it must speak to the judges of courts that might interfere with those arbitrators; and finally, when the arbitrators render their award, the clause must speak to the judges of courts that will enforce it.[506]

Generally, the language must indicate the solemn nature of the arbitration clause and the responsibilities imposed upon the parties.[507] The clause must also indicate the unqualified authority of the arbitrator to re solve disputes.[508] Third, the clause must adequately convey to judges that the arbitration proceeding should not be interfered with.[509] Finally the clause must indicate an expectation that the judgment as rendered by the arbitrators will be enforced.[510] Although a daunting task, a draftsman may address all of there concerns if he spends time addressing all the scenarios that might occur. In other words, the draftsman must "devise a legal system that will sustain the arbitration clause in every jurisdiction in which it is likely to be tested."[511] As a means of accomplishing this, the New York Convention and Inter-American Convention, the two sources that NAFTA references, are the most applicable textual models.[512]

The clause should also be drafted with the understanding that terminology might be different in the United States and Mexico. In fact, in the context of contract law, United States and Mexican terminology differ

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Courts: The U.S. Foreign Sovereign Immunities Act in Practice, *in* DOING BUSINESS IN MEXICO 7-40 to 7-41 (Edward L. Newberger ed., 1974) (providing additional example of waiver clause).

506. Ewell E. Murphy, Jr., *How to Draft a Transnational Arbitration Clause: The Four Languages of Charles V*, *in* CORPORATE COUNSEL'S GUIDE TO INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION 3.002 (William A. Hancock ed., 1993).

507. *Id.* at 3.003.

508. *Id.*

509. *Id.*

510. *Id.* at 3.004.

511. *Id.* at 3.004 - .005.

512. They provide "the draftman's readiest tools for planning the worldwide enforceability of a transnational arbitration clause." *Id.* at 3.005.

markedly.[513] Thus, the drafter must cautiously select the appropriate terminology to fulfill the intention of the parties and lead to enforcement of both the agreement and the award.[514]

All of these concerns become more pressing when dealing with a state or state enterprise. In such cases, arbitration clauses must be "phrased much more carefully and clearly."[515] To do so requires more research than when dealing with a private party.[516] Also, the party should realize that arbitration tends to be slower when dealing with a state enterprise and that patience should be exercised.[517]

d. Technicalities

The arbitration agreement[518] should generally be in writing[519] and

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513. HERGERT & CAMIL, *supra* note 343, at 41.

514. REDFERN & HUNTER, *supra* note 224, at 116. For example, in determining what matters the arbitration agreement will pertain to, the United States and England, though sharing a common language, have different interpretations. In England, using the words "claims", "difference", and "disputes" would bring in the most matters for consideration under arbitration. *Id.* However, in the United States, "controversies" would capture the most issues for resolution by arbitration. *Id.* These types of concerns could only be amplified between the United States, an English speaking country and Mexico, a Spanish speaking country.

515. BOCKSTIEGEL, *supra* note 340, at 51. The drafter must provide for typical concerns, but also "insure that it is binding on the sovereign state and will not be stymied by a defense of sovereign immunity." AKSEN & MEHREN, *supra* note 387, at 60.

516. *See* BOCKSTIEGEL, *supra* note 340, at 52. Before drafting an arbitration clause with a state or state enterprise, the party should be fully cognizant of the activities of the state or state enterprise and make sure to determine that the person with whom they are dealing is authorized to act on its behalf. *See id.* To prevent assertion that the party entering the deal did not have State authority to do so, the drafter can add the following to the arbitration clause: "Each party affirms that it has full legal authority to enter into the obligations which they undertake in this contract, including the full legal authority to enter into this arbitration agreement." AKSEN & MEHREN, *supra* note 387, at 358.

517. BOCKSTIEGEL, *supra* note 340, at 52-53. To speed up the process, the procedure of arbitration should be clearly established. *Id.*

518. An arbitration agreement differs from an arbitration clause. An arbitration agreement is the manifestation of assent by the parties to place the matter before arbitration. "'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not." UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 7(1) (U.N. Comm'n on Int'l Trade Law 1985). In contrast, an arbitration clause can be a basis for an arbitration agreement. "An arbitration agreement may be in the form of an arbitration clause or in the form of a separate agreement." *Id.*

519. The New York Convention provides recognition of an "agreement in writing." New York Convention, *supra* note 269, at Article II. The Inter-American Convention speaks of an "instrument signed by the parties." Inter-American Convention, *supra* note 289, at Article 1. Clarity in writing requires considerable thought since the

signed by the parties, but other means exist to obtain a valid agreement.[520] The validity of the arbitration agreement must be established, for if there is a deficiency, a subsequent arbitration award need not be enforced.[521] However, the drafter should find some solace in the fact that the "formal requirements" for a valid arbitration agreement will be tested by reference to the New York and Inter-American Conventions, not by differing national law.[522]

Arbitration clauses should generally be incorporated directly into the commercial agreement.[523] The clause can also be incorporated by reference.[524] However, it has generally been held that some degree of acknowledgement or acquiescence is required to bind both parties to arbi-

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clause or agreement will likely be in Spanish as well as English. Camp, Jr., *supra* note 223, at 735. Particular words, their denotation and connotation, must be examined to ensure that there is consistency in the two languages.

520. Under the New York Convention, parties can satisfy the "agreement in writing" requirement through an "exchange of letters or telegrams." New York Convention, *supra* note 269, at Article II (2). The Inter-American Convention is satisfied by "an exchange of letters, telegrams, or telex communications." Inter-American Convention, *supra* note 289, at Article 1. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 cmt. d. (1987).

521. An award obtained under an arbitration agreement "not meeting the requirements of the Convention may be valid . . . but enforcement of such an award is not required by the Convention." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 Cmt. d. (1987).

522. 1 SMIT & PECHOTA, *supra* note 236, at 27.

523. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 reporter's note 3 (1987). This is the method of choice whereby the arbitration clause is "itself part of an ordinary commercial contract." REDFERN & HUNTER, *supra* note 224, at 112.

524. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW sect. 487 (1987). Black's Law Dictionary defines incorporation by reference as:

> The method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as it were fully set out therein.

BLACK'S LAW DICTIONARY 767 (6th ed. 1990).

In this setting, an agreement to arbitrate incorporated by reference has been held effective if the parties have "roughly comparable bargaining strength" and have dealt with each other in the past. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 reporter's note 3 (1987).

tration.[525] The power to arbitrate a dispute is "derived from and based on the agreement of the parties."[526]

e. Additional elements

Typically, an arbitration clause should contain the following: (1) an agreement to submit to arbitration all or a defined set of disputes that could arise under the contract, (2) an settled place of arbitration and (3) procedures for the appointment of arbitrators.[527] Many arbitration clauses contain additional matters.[528] Regardless of what one decides to include in the clause, if the agreement to arbitrate can be shown to be "unequivocal," the clause will generally be held effective, despite missing terms.[529]

The businessperson should not feel overwhelmed or confused by the number of matters that could be included in an arbitration agreement or clause. Many institutions exist which provide valuable assistance in this task.[530] Additionally, many articles have been written that help in addressing these particular concerns.[531] Attempting to outline all the possible scenarios or difficulties that could arise in a business relationship is

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525. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 reporter's note 3 (1987). Confirming orders sent by one party but unsigned and unreturned by the receiver has generally been held not to create an agreement to arbitrate, even if the underlying contract has proceeded. *Id.*

526. Danilowicz, *supra* note 222, at 250.

527. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 reporter's note 3 (1987).

528. *Id.* For example, "the language in which the arbitration is to be conducted; . . . the law to govern the arbitration and/or the contract; and . . . conduct of the arbitration under the rules of a specified arbitral institution." *Id.* For a discussion of these matters, see Camp, Jr., *supra* note 223, at 734-39.

529. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487, reporter's note 3 (1987). "In general, issue of applicable law, procedure, language, and place of arbitration can be resolved by the arbitrators; if the agreement fails to provide for the method of selection of arbitrators, a court can appoint the arbitrators or direct their appointment." *Id.*

530. For example, the businessman can look to the American Arbitration Association (AAA), one of the world's largest arbitral institutions handling international disputes for guidance. Ronald A. Brand, *American Arbitration Association International Arbitration Rules*, I.E.L. VIII-E-5 (July 1991). This institution will assist in initiating arbitration proceedings, providing and appointing arbitrators, giving technical expertise to facilitate the process, assist in general administration of the arbitration proceedings, and communicating the award to the interested parties. *Id.* If the parties can not agree on the "details", the AAA will held to "fill the gaps." *Id.*

531. *See, e.g.*, Robert Coulson et al., *Choosing A Forum For International Commercial Arbitration*, 76 AM. SOC'Y INT'L L. PROC. 166 (1982); Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. & BUS. 48 (1991).

difficult, so the arbitration clause or agreement should be drafted broadly to bring in as much as possible.[532] Sources exist that assist the drafter in considering the most important issues to include in the arbitration clause or agreement.[533] As a final matter, the clause should attempt to bring in all the matters and procedures that the parties involved believe will be or could be significant.[534] "[I]t is essential that the arbitration clause give the arbitrators as much authority as the parties intend."[535] A properly drafted arbitration agreement or clause is the first step in adding certainty to an international business deal. An American businessper-

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532. Camp, Jr., *supra* note 223, at 735. This source favors the following language: "Any dispute or controversy or claim arising out of or in connection with or relating to this contract, or breach or termination or invalidity thereof, shall be finally settled by arbitration." *Id.*

533. Fagan & Arreola, *supra* note 30, at 811-12. This source indicates answering the following questions help in determining the controlling authority in arbitration of commercial disputes between Mexico and the United States:

> (1) Was there a contract in writing?, (2) If the contract had a choice-of-law clause, what law did it specify?, (3) If the choice-of-law clause specified [United States law], does that choice of law also include [United States] law on conflicts of law, (4) Was the transaction covered by the United Nations Convention on the International Sale of Goods (CISG), and, if so, does it matter?, (5) Is the question to be decided a matter of substance or procedure?, (6) Did the contract have an arbitration clause, and, if so, did it specify the rules to be followed in the arbitration proceeding, (7) If the contract had a choice-of-law clause, did the same choice of law apply to both the substance of the contract and the arbitration clause?, (8) If the contract is found to be invalid but the arbitration clause enforceable, what law controls, (9) At what point in the arbitration process do the following questions arise: is a party resisting arbitration; is a party to an ongoing arbitration asking for ancillary relief from the court; or is a party trying to enforce or overturn an arbitration award?

Id. at 811-12.

The CISG governs the buyer's rights and seller's rights and duties when the parties fail to provide for choice of law in their sales contract. United Nations Convention on Contracts for the International Sale of Goods, 19 I.L.M. 668 (1980). Both Mexico and the United States are parties to the convention. *Id.*

534. This is necessary because an arbitral tribunal possesses only limited powers. RALSTON, *supra* note 70, at 43. The clause itself must define the powers and procedures that pertain to the arbitral tribunal. *Id.* "An arbitration agreement does not merely serve to evidence the consent of the parties to arbitration and to establish the obligation to arbitrate. It is also the basic source of the powers of the arbitral tribunal." REDFERN & HUNTER, *supra* note 224, at 5.

535. INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION 3.011 (William A. Hancock ed. 1993).

son attempting trade with Mexico should devote considerable time and effort to this essential element of an international business transaction.

VII. CONCLUSION

The inevitable expansion in world trade will result in "increasing interactions between nations."[536] NAFTA encourages, and rightly so, the increase of trade and business between the United States and Mexico. As a natural result, increasing trade disputes will likely result. Alternative dispute resolution is the most effective means of resolving such conflicts without one party becoming subject to another party's national court system, which may be unfamiliar, slow, and expensive.[537]

When American businesses desire to engage in trade with Mexico, they must understand the unique problems and issues that arise in such business dealings.[538] Businesses should, at a minimum, become aware of the differences of the two legal systems existing in the United States and Mexico.[539] Great opportunities exist to increase trade with Mexico due to the passage of NAFTA. American businesses should avail themselves of such opportunities while taking into account the risks involved, and with the understanding that such risks can be minimized if proceeding with caution and knowledge.

The provisions provided for in NAFTA provide "no guarantee" that ev erything will be settled out of court.[540] The methods envisioned by NAFTA remain a voluntary and consensual process, and are always dependent on the parties involved abiding by their obligations. In addition, to be effective, the national governments must also honor their commitments.[541] However, as this Comment has attempted to explain, the more

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536. WINHAM, *supra* note 34, at 131.

537. Camp, Jr., *supra* note 223, at 751.

538. Fagan & Arreola, *supra* note 30, at 820. The business transaction will occur between "people who come from different cultures, do not speak the same language, and are accustomed to totally different legal systems." *Id.*

539. "Mexico . . . and the United States have fundamentally different legal systems." Fitch, *supra* note 35, at 387.

540. Coulson, *supra* note 531, at 167. For example, the party against whom an arbitration award is rendered may make appeals to the national court systems to delay enforcement of the award. *See, e.g.*, Parsons & Whitemore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 978 (1974) (noting use of "numerous defenses to enforcement of the arbitral award").

541. In the past, States have "always" had an interest in the resolution of disputes within their boundaries and thus were likely to become involved. Danilowicz, *supra* note 222, at 257. However, with the increased level of international trade, states have begun to realize that "national intervention hampers business transactions." *Id.* As such, if nations are to benefit from this increased world trade, it is likely that they

matters and issues that can be tied down at the outset of the contract or business deal, the better the chances that the dispute settlement techniques chosen will work as intended.

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will remove themselves from the process.